EXHIBIT AA

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 08-13555(JMP)

Case No. 08-01420(JMP)(SIPA)

Adv. Case No. 09-01258

Adv. Case No. 08-01743

Adv. Case No. 09-01242

- -x

In the Matter of:

LEHMAN BROTHERS HOLDINGS, INC., et al.,

Debtors.

- -x

In the Matter of:

LEHMAN BROTHERS INC.,

Debtor.

- -x

NEUBERGER BERMAN, LLC,

Plaintiff,

-against-

PNC BANK, NATIONAL ASSOCIATION,

LEHMAN BROTHERS INC., AND LEHMAN

BROTHERS COMMERICAL CORPORATION,

Defendants.

- -x

- -x

STATE STREET BANK AND TRUST COMPANY,

Plaintiff,

LEHMAN COMMERCIAL PAPER INC.,

-against-

Defendant.

- -x

LEHMAN BROTHERS SPECIAL FINANCING INC.,

Plaintiff,

BNY CORPORATE TRUSTEE SERVICES, LTD.,

-against-

Defendant.

- -x

U.S. Bankruptcy Court

One Bowling Green

New York, New York

September 15, 2009

10:03 a.m.

B E F O R E:

HON. JAMES M. PECK

U.S. BANKRUPTCY JUDGE

RE: CASE NOS. 08-13555(JMP) and 08-01420(JMP)(SIPA)

HEARING re Interim Applications for Allowance of Compensation for Professional Services Rendered and for Reimbursement of Actual and Necessary Expenses [Docket No. 4839]

HEARING re Motion of Wells Fargo, NA for Relief from the Automatic Stay [Docket No. 4640]

HEARING re Motion of Wells Fargo, NA for Relief from the Automatic Stay [Docket No. 4671]

HEARING re Motion of Washington Mutual Bank f/k/a Washington Mutual Bank, FA. For Relief from the Automatic Stay [Docket No. 4759]

HEARING re Motion of A/P Hotel, LLC for Relief from the Automatic Stay [Docket No. 4950]

HEARING re Motion for Authorization to Assume an Interest Rate Swap with MEG Energy Corp. [Docket No. 5012]

HEARING re Debtors' Motion for Establishment of Procedures for the Debtors to Transfer Their Interests in Respect of Residential and Commercial Loans Subject to Foreclosure to Wholly-Owned Non-Debtor Subsidiaries [Docket No. 4966]

HEARING re Debtors' Motion for Establishment of Procedures for the Debtors to Compromise Claims of the Debtors in Respect of Real Estate Loans [Docket No. 4942]

HEARING re Motion of Landwirtschaftliche Rentenbank for 2004 Examination [Docket No. 4800]

HEARING re Debtors' Motion for Authorization to Implement Alternative Dispute Resolution Procedures for Affirmative Claims of Debtors Under Derivative Contracts [Docket No. 4453]

HEARING re Debtors' Motion to Compel Performance of Metavante Corporation's Obligations Under an Executory Contract and to Enforce the Automatic Stay [Docket No. 3691]

HEARING re Motion of DnB Nor Bank ASA for Allowance and Payment of Administrative Expense Claim and Allowing Setoff of Such Claim [Docket No. 4054]

HEARING re Motion of William Kuntz, III for Review of Dismissal of Appeal [Docket No. 1261]

RE: ADV. CASE NO. 09-01258:

PRE-TRIAL CONFERENCE

RE: ADV. CASE NO. 08-01743:

PRE-TRIAL CONFERENCE

RE: ADV. CASE NO. 09-01242:

Motion of BNY Corporate Trustee Services Limited to Stay Further Proceedings Pending Disposition of its Motion for Leave to Appeal the August 12, 2009 Order Denying BNY's Motion to Dismiss and any Disposition of the Merits of that Appeal

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P R O C E E D I N G S

THE COURT: Be seated, please. Good morning.

Mr. Miller.

MR. MILLER: Good morning, Your Honor. Harvey Miller, Weil, Gotshal & Manges, on behalf of the debtors. I have to note, Your Honor, that this morning is a much quieter morning than it was a year ago today on this date. We seem to have survived a year.

THE COURT: We've survived a year, although I'll tell you that a year ago today it was completely quiet here.

MR. MILLER: Not in my life, Your Honor. In any event, we're prepared to go forward, Your Honor, with another omnibus hearing, and the first matter on the calendar, Your Honor, under uncontested matters are the second round of interim applications for allowances of compensation for professional services rendered and for reimbursement of actual and necessary expenses.

In connection with the applications, Your Honor, that have been filed to date and in accordance with the fee protocol, the fee committee has filed two reports on fee applications. The first report pertained to the first interim fee applications, and more recently on September 10, 2009 the fee committee filed its second report concerning the second interim fee applications.

If I may, Your Honor, with respect to the first

interim fee applications, the report addresses the first interim fee applications that were considered by the Court at an earlier hearing. At the time of the consideration of those fee applications, the fee committee had made interim recommended deductions, where pertinent, to certain of their first interim fee applications.

In the fee committee report dated September 10, 2009, the committee has submitted final recommended deductions as to those fee applications. The report recommends that such deductions be applied against the ten percent holdback amount relating to the first interim fee applications. The report sets out the first recommended deduction and the final recommended deductions at pages 2, 3, 4 and 5 of the report.

The final recommended reductions applicable to the first round of interim fee applications totals $186,660.08. Assuming that each of the retained professionals agrees to the final recommended deduction, the fee committee recommends that after application of those deductions the balance of the ten percent holdback amount relating to the first interim fee applications be released to the respective retained professionals.

I do note, Your Honor, that as to one retained professional, Houlihan Lokey Howard Zukin Capital, Inc., the final recommended deduction has been deferred. The applicant and the fee committee will be in further discussions concerning

the recommended deduction.

As to all of the other retained professionals who agreed to the final recommended deductions, we request that the Court allow the payment of the balance of the ten percent holdback amount to each of the retained professionals.

As to the second interim fee applications, Your Honor, the fee committee report, in the same fashion, used the process that was applied as to the first set of interim fee applications. It's -- the report sets forth the process used by the fee committee and its professionals in reviewing the second interim fee applications and sets forth that each retained professional has been sent an individual summary sheet setting forth in detail the deductions recommended in the fees and allowances by the committee. This is essentially the same process that was used in connection with the first interim fee applications.

The second interim fee applications cover the period from February 1 through May 31, 2009. There are eighteen applications for allowances of interim compensation and reimbursement of expenses.

The requested fees, Your Honor, total $115,193,605.42. The reimbursement of expenses requested totals $4,036,840.23.

I note for the Court's consideration that during the period covered by the second interim fee applications the investigation into the affairs of the debtors expanded, caused

both by the appointment of an examiner and his professionals, as well as the expansion of professional services performed on behalf of the creditors' committee. Those facts account for the increase in the aggregate total of the requested allowances of compensation and reimbursement of expenses.

Of the eighteen applications filed by retaining professionals, twelve are for retained professionals that were engaged by the debtors-in-possession for the applicants or professionals retained by the unsecured creditors' committee, and the remaining two applications are professionals retained by the examiner.

The fee committee recommendation as to the second interim applications: The fee committee has recommended deductions applicable to the second interim fee applications totaling $2,512,685.76, comprised of requested fees and expenses. The committee also recommends that the twenty percent holdback amounts in respect of the second interim fee applications be reduced to ten percent pending the resolution of the issues that had been set forth by the committee in the individual summary sheets provided to each of the retained professionals.

Based upon the fee committee report and all of the proceedings which have taken place, it is requested that the Court allow the second interim fee applications, consistent with the fee committee report, and direct the payment of such

allowed fees and expenses subject to the ten percent holdback amounts to cover remaining outstanding issues and further order of the Court.

And again, Your Honor, I note that these are interim allowances and will be reconsidered at the time of final applications.

So that is the requested relief at this time, Your Honor.

THE COURT: That's understood. I have read the fee committee report dated September 10 which you have just summarized, and I find that it's very helpful in not only summarizing the nature of the committee's review of the applications filed by the various retained professionals but also in noting areas of concern with respect to future applications to be filed.

One thing that I did note, and I don't know to what extent this is a subject for concern or not, is that the amount recommended for disallowance seems to have grown. I'm not sure if it has grown as an overall percentage of the fees or if it's just that because the overall fees are a higher number, that we ended up with a higher number for proposed disallowance. I can't tell to what extent that reflects some change in the way these applications are being presented. And because this is not broken out on a professional-by-professional basis, I can't tell whether or not this is an across-the-board problem or a

problem that relates to a particular professional.

But I do appreciate the fact that this is a process which, at least as I'm observing it, seems to be working quite well. And I'll simply ask if there's anyone --

MR. MILLER: I would just add, Your Honor --

THE COURT: -- who's a member of the committee, who wishes to be heard on this.

MR. MILLER: The recommended deductions: In the individual summary sheets, Your Honor, the committee sets forth in great detail what is the issue with respect to a particular item in a fee application. Thereafter there are -- I wouldn't call them negotiations -- discussions with the committee representatives, and either the applicant explains satisfactorily whatever the comment is or that will be the final recommended deduction.

THE COURT: I understand --

MR. MILLER: Okay.

THE COURT: -- that's the way it works. The way this is developed in terms of my own involvement, however, is that I'm not seeing those individual sheets. It may be that I should see those sheets so that I have a better understanding as to where the problems appear to be among the various professionals. If the committee would prefer not to do that, I'm not going to make an issue of it. But I do note that, at least as I'm reviewing this report, I'm only seeing broad

numbers except for the review on an application-by-application basis of the first interim report and how that has been reconciled. But I'm unable to tell, other than the gross number, what the committee has come up with to get to the $1,975,451.68 recommended disallowance as to fees in the aggregate.

So I'm going to make the suggestion, if the committee is willing to do this, that I would like to see, for in-camera review at the time of the next report, copies of the individual proposed disallowances by applicant. I also think that it would be useful for me to see the sheet applicable to this report on a professional-by-professional basis. It doesn't affect my determination of today's applications. I'm prepared to approve them consistent with the report, and I'm also prepared to approve the reduction in the holdback from twenty percent to ten percent, pending resolution of any ongoing disputes with affected professionals.

MR. MILLER: I would just add, Your Honor, that the committee has worked very diligently. And I think Mr. Feinberg said at our last meeting that he actually didn't realize what he was getting into when he accepted the position.

THE COURT: I was confident that was true when he accepted the position.

MR. MILLER: He has now realized it, Your Honor.

THE COURT: And I'm glad that he's hard at work.

So those applications are all allowed --

MR. MILLER: Thank you, Your Honor.

THE COURT: -- subject to the comments just made.

MR. MILLER: Going on with the calendar, Your Honor, items 2, 3, 4 and 5, Your Honor, as well as 6, are all subject to stipulations and agreed orders that will be submitted to the Court. And I don't believe, Your Honor, we need to go through that since the parties have agreed, unless Your Honor wants to go into each one of those items.

THE COURT: Well, the one item that I am actually most interested in hearing some more about, even though we're going through this in summary fashion, is number 6, which is the motion for authorization to assume an interest rate swap with MEG Energy.

MR. MILLER: Yes, sir.

THE COURT: I'm astounded that this was unopposed in the result of the stipulated order, particularly since we have on the calendar later today a matter involving Metavante, which is substantially --

MR. MILLER: Yes.

THE COURT: -- similar in terms of its legal issues. How did this stipulated order come about?

MR. MILLER: I will defer to Mr. Lemons, Your Honor.

May we consider, Your Honor, the other items, 2, 3, 4 and 5, as submitted?

THE COURT: Yes.

MR. MILLER: Thank you.

MR. LEMONS: Good morning, Your Honor. Robert Lemons from Weil, Gotshal & Manges, on behalf of Lehman Brothers. Your Honor, shortly after we filed the motion seeking authorization to assume the ISDA and the interest rate swaps under it, my understanding is MEG Energy and Lehman Brothers engaged in discussions where MEG indicated that it would be actually willing to allow Lehman to assume the contract pursuant to a stipulation, with the one proviso that Lehman agree in the stipulation that it will purchase an interest rate cap that will generate cash flows equal to any amounts that Lehman would have to pay in the future under the contract.

THE COURT: What about payment of the 9.7 million dollars in dispute?

MR. LEMONS: MEG Energy is going to pay that amount, plus an additional amount that represents interest that's incurred on it, within three business days of entry of the stipulation.

THE COURT: That's a good stipulation.

MR. LEMONS: And, additionally, just to complete the record, Your Honor, the parties have also agreed that all existing defaults, including as caused by the bankruptcy filings, are cured upon the assumption and that LBHI shall no longer be a guarantor under the agreement.

THE COURT: Okay, thank you.

MR. LEMONS: So we'll be submitting that later today for Your Honor. Thank you.

MR. BERNSTEIN: Good morning, Your Honor. Mark Bernstein from Weil, Gotshal & Manges, on behalf of the debtors. The next two motions on the agenda relate to omnibus procedures that the debtors are seeking to establish to enable them to officially manage and monetize their portfolio of commercial and residential mortgage loans. The debtors believe that the transactions entered into pursuant to these two motions are transactions of the ordinary course of their business. However, the debtors worked over the last few months with the creditors' committee to come up with procedures that would increase the transparency and formalize a protocol for the approval of such transactions between the debtors and the committee.

The first motion, which is item number 7 on the agenda, seeks to establish procedures by which they may transfer residential or commercial mortgage loans immediately prior to foreclosure into wholly-owned subsidiaries of the applicable debtor and then procedures by which that subsidiary may sell such loan and then distribute the cash back up to the applicable debtor.

The purpose that -- the purpose for which the debtors want to enter into these types of transactions, which are

typical in the mortgage lending field, are that acquiring properties pursuant to a foreclosure makes the debt -- makes the -- that entity subject to liabilities, tort or environmental or other type, by acquiring the property. So by putting the property down into an SPE, it shields the debtors' assets from those liabilities while at the same time retaining the economic benefit.

The second motion, which is number 8, and we can take these together or take them apart since they are somewhat similar --

THE COURT: Why don't we take it together.

MR. BERNSTEIN: Sure. The second motion, number 8, relates to the acceptance of the debtors of discounted payoffs or modifying the terms of residential mortgage loans. In many instances, entering into these transactions is an economic benefit to the debtors rather than risking nonpayment of such loans or letting such loans go into default and foreclosure.

The procedures were put in place, as I said, in cooperation with the creditors' committee, and there are various thresholds or triggers which require creditors' committee approval prior to entering into such transaction.

THE COURT: I noted the statements of the committee in support of both of these motions as well as the ad hoc group of Lehman Brothers creditors, sometimes referred to as the hedge funds. And that suggests, to me at least, that this is a

process that has been openly vetted with the constituencies that you need to deal with, and these procedures appear to be appropriate.

MR. BERNSTEIN: I would just add one more thing, Your Honor. There have been a couple comments and conversations the debtors have had since we filed the motions, and we've made some slight changes to the motions providing for some public disclosure at the request of the ad hoc group of Lehman Brothers creditors. It is a quarterly report that just provides the number of loans and the aggregate of all those loans for which such transactions were entered into. And in the motion and the order -- proposed order for number 7 on the agenda, which relates to the transfer of loans and special-purpose entities, we also added provisions relating to the preservation of rights of parties who may have other interests in these loans, such as participations or pledges, saying that this -- these procedures don't diminish their interest in any way.

THE COURT: Okay. This is uncontested. I'll just ask, because there were statements of support, if anyone wishes to be heard with respect to either number 7 or 8 on the agenda.

MR. O'DONNELL: Good morning, Your Honor. Dennis O'Donnell, Milbank, Tweed, Hadley & McCloy, on behalf of the official committee. I'll simply concur with Mr. Bernstein's remarks about these motions. We have worked closely together

for the past couple of months and we have, I think, improved the procedures as originally proposed to ensure that there are protections against transactions with insiders, transactions with multiple purchases, transactions to various sorts, and ensure that the committee will be able to have a full and complete review of these transactions before they go forward or -- and to the extent that they hit certain thresholds that actually come to the Court as well. And based on what has been an open and cooperative process, we believe that this motion -- both these motions should be approved.

THE COURT: Fine. They're both approved.

MR. MILLER: The next matter on the calendar, Your Honor, under contested matters is the motion of the Rentenbank and for authority to conduct Rule 2004 examinations.

MR. TRETTER: Good morning, Your Honor. Lyndon Tretter of Hogan & Hartson, for Rentenbank. We're here on a 2004 discovery application. And what we've been accused of doing in the opposition papers is supposedly advancing our defense in a U.K. action. It's absolutely not true, Your Honor. We wish that U.K. action did not exist.

What we're trying to pursue here is the question of substantive consolidation.

THE COURT: Why do you need to pursue that now?

MR. TRETTER: Well, Your Honor, it's been a year, and the question will be --

THE COURT: It's hardly before the Court at this point.

MR. TRETTER: Well --

THE COURT: It's been a year. You're saying that it's now September 15, 2009 and that it means that it's time for individual creditors to take discovery with respect to substantive consolidation months before the examiner completes his work?

MR. TRETTER: Well --

THE COURT: You must be kidding.

MR. TRETTER: I'm not kidding, Your Honor.

THE COURT: I think you must be.

MR. TRETTER: Okay. If you're saying --

THE COURT: Why do you need this discovery now if it's unrelated to the U.K. action?

MR. TRETTER: Well, Your Honor, some --

THE COURT: Is it related to the U.K. action or not?

MR. TRETTER: No, Your Honor. We are --

THE COURT: Then why do you need it now?

MR. TRETTER: We don't need it this second, but we need to start it at some point, and some point this --

THE COURT: That some point will not be now. Your motion's denied without prejudice.

MR. TRETTER: Thank you, Your Honor.

(Pause)

MR. GRUENBERGER: Good morning, Your Honor.

THE COURT: Good morning.

MR. GRUENBERGER: Peter Gruenberger, Weil, Gotshal & Manges, for the debtors. May it please the Court. I rise again in support of the debtors' motion for the Court to implement derivatives ADR procedures and to enter a proposed order that includes mediation as a major component of ADR.

Your Honor was absolutely correct on August 15th to continue this hearing until today. The debtors and the creditors' committee in fact did make a great deal of progress with derivatives counterparties and indentured trustees to make further changes to the proposed order.

In my supplemental declaration filed last Friday, we put forth the report Your Honor requested that the debtors and creditors' committee file concerning that progress and the results we obtained from further negotiations and discussions in that almost three-week period. That report details the great efforts we made and the many accommodations we gave that -- as many as we reasonably could, to derivatives counterparties and indentured trustees regarding further substantive changes to the revised proposed order compared with the one that was before you on August 26th.

To that end, we distributed three separate post-hearing revised orders to all remaining objectors, and there were fifty-six such remaining objectors left. Those changes

reflected twenty-two new changes that were made to the August 26 form of proposed order, and those changes were in addition to the original twenty-two changes we had made to the original proposed order we had attached to our motion. Thus, there were forty-four substantive changes, different ones made by us, in the proposed orders. Those three new revised orders are attached to my supplemental declaration as Exhibits A, C and G.

In addition, we sent e-mails to every remaining objector, whether counterparty or indentured trustee, asking them to inform us whether they were withdrawing their objections in toto and, if withdrawn in part only, which grounds remained. And we asked those remaining objectors for suggested substantive language changes to aid in the process. Those e-mails were attached to my supplemental declaration as Exhibits B, D and F.

In aggregate, of the fifty-six objectors remaining as of the August 26th hearing, as of this morning forty-one objectors have withdrawn their objections entirely, leaving fifteen remaining counterparty objectors. And all indentured trustees have withdrawn their objections entirely.

Further, as of August 26th, all objectors had asserted in aggregate a total of sixty-eight different grounds of objection. That number has been reduced to approximately forty-five different grounds remaining as of today. Those results are reflected in Exhibit G to my supplemental

declaration, which is the same chart that we presented to Your Honor on August 26, except we now added two columns on the right side of Exhibit G to reflect the original number of objectors and remaining number of objectors per each ground of stated objection.

All the modifications we made between August 26 and September 14 are cumulatively shown in the final post-hearing revised order we filed with the Court yesterday in both blacklined and clean versions.

So much for the good news, Your Honor. Now the not-so-good news. I too was correct, Your Honor, on August 26 in predicting that no matter what debtors and creditors' committee did, there would be some counterparties who would dig in. That in fact turned out to be the case. In that regard, seven counterparties of the remaining fifteen objectors simply have ignored our three requests for some kind of response. They just failed to respond to us altogether. An additional four of the fifteen remaining counterparties objectors have not told us which of their asserted grounds of objection remain.

So eleven out of fifteen objectors remaining, or about seventy-five percent of them, have kept us all in the dark. We don't know whether they still object on all or any of their asserted grounds. Not one of these remaining eleven objectors stood up on August 26 to say anything in response to Your Honor's request that day that asked whether waiting until

September 15th would be fruitless. They said nothing. We interpreted that silence as being a very good sign, and for a vast majority of the objectors it was a good sign. For these eleven, however, we were wrong in our estimation of what that silence meant.

At this point I'd like to thank the vast, vast majority of counterparties who, despite their differences with us and with the creditors' committee -- for having acted in a fair, balanced and responsive manner to the charge Your Honor gave all of us to go back and do the best job we could. I think we've done it.

Before turning to the remaining fifteen objections, Your Honor, I am sure the creditors' committee wishes to be heard, and I would hope that Your Honor would allow any objectors who have withdrawn their objections entirely to speak, if they wish to do so, about the process and the experiences we had. And we can come back to the remaining objections if Your Honor will allow us to do that.

THE COURT: Okay, I'll hear from the committee, although it seems to me that in the end it's going to be more important for me to hear from those parties who are still pressing their objections.

MR. GRUENBERGER: Yes, of course, Your Honor.

MR. COHEN: Good morning, Your Honor. David Cohen with Milbank, Tweed, Hadley & McCoy, here on behalf of the

official committee of unsecured creditors. As Mr. Gruenberger noted, the committee has worked with the debtors since the inception of the idea for ADR. The committee strongly believes it's necessary and appropriate. We've worked with the debtors, both before filing the original motion and after the subsequent hearings, to come up with procedures that were largely consensual. I think we're there as far as we can get. There are very few remaining objections.

There is one remaining objection to the participation of the committee; I'm happy to address that now or after that party makes the objection.

THE COURT: Well, you're standing. Why don't you address it now?

MR. COHEN: Certainly. The committee has already played an important role in this process. The committee has brought together a number of counterparties and the debtors. In my own conversations with a number of derivatives counterparties as a result of these negotiations, they took great comfort in the fact that the committee would be part of this process and would serve as a check on concerns involving fears that the debtors would somehow act improperly.

A specific example of this is paragraph 3A of the revised proposed order, which deals with termination and which transactions can be channeled through ADR. Several objectors wanted it made clear that the expectation is that the

termination language is largely intended to apply to counterparties, that there may be certain instances where the debtors have termination rights.

In exchange for me making that statement and that clarification here on the record, two derivatives counterparties were willing to withdraw their objection: Oceania actually withdrew, and the Hebron Academy, whose objection is at docket number 4572, has told me that it should -- I can represent to the Court that it does not oppose entry of the revised order.

Clearly, the committee has played, and will continue to play, an important role here. Second, the committee's duties under Section 1103 and its right to be heard under Section 1109 of the Bankruptcy Code make clear that the committee should be part of the process. The ADR envisioned by this motion in the revised proposed order involves hundreds of transactions and hundreds of millions of dollars. Excluding the committee from this process would effectively prevent the committee from exercising its statutory obligations and its rights.

THE COURT: Let me ask you a question --

MR. COHEN: Certainly.

THE COURT: -- just about what the committee's role is going to be as you envision it. Are you there as a cheering section for the debtor, are you there as an extra mediator to

act as a go-between, or are you there as an observer? Or do I have it wrong as to all of those categories?

MR. COHEN: It is actually much more fluid than the Court just suggested. Under the revised proposed order, the committee would consult with the debtor in setting the initial demand. The committee would also have a consultive (sic) role in responding to any counteroffer. So it would work like the December derivative settlement order where the committee plays a role in determining what is an acceptable range with which to settle. And so it's got two consultive roles: one, with the initial demand, and second, with the counteroffer.

With respect to the actual mediation itself, the committee may participate but it's not required to participate. So what the committee envisions is that it would not be sitting at every mediation. There would be some where the dollar amounts or the legal issues were significant that the committee felt it was appropriate that it be part of that process. And the committee, having weighed in formally both on the initial offer and the counteroffer, would then be in a position to agree if a settlement were achieved as the result of a mediation, whether the committee was there or not, as to whether it was appropriate to be settled under the December derivative settlement order.

THE COURT: Okay. Thanks for that.

MR. COHEN: So we also think the fact that there are

three ways to settle disputes as a result of mediation under the December order, the January assignment order or a 9019 suggests that the committee should be involved. If the committee is not involved in mediation, then effectively every settlement that comes out of mediation has to come before the Court on a 9019 motion. The committee then would have to, after the fact, look at the facts, the legal arguments and the merits and be revisiting the debtors' business judgment. We think that that hinders efficiency, overly burdens the Court and is unnecessary.

The other concern that certain counterparties have raised is that the committee's participation somehow undermines the confidentiality of mediation. We think this argument is frivolous. The committee would be bound by the confidentiality provisions just as every other party to the mediation.

We think that the revised proposed order is necessary and appropriate, and we would request that the Court enter that order.

THE COURT: Okay, thank you for your statement of position.

MR. COHEN: Thank you.

THE COURT: Mr. Gruenberger --

MR. GRUENBERGER: Your Honor --

THE COURT: -- do you have a suggestion for managing this process now?

MR. GRUENBERGER: Yes, Your Honor. I don't know if there's any counterparty or indentured trustee here today that wants to say something in support of the order or not. If not, Your Honor --

THE COURT: Well, some people are jumping up. All of a sudden your invitation has --

MR. GRUENBERGER: I'm sorry?

THE COURT: -- has gotten some traction out there.

MR. GRUENBERGER: I see Eric Schaffer, Your Honor.

MR. SCHAFFER: Your Honor, Eric Schaffer, Reed Smith, for BNY Corporate Trustee Services, Bank of New York Mellon. As we were one of the focuses of the discussion at the last hearing on this, I want to confirm everything that Mr. Gruenberger said. We did have a very good give-and-take. We resolved all of our issues to our mutual satisfaction.

THE COURT: Good.

MR. ANTONOFF: Good morning, Your Honor. Rick Antonoff from Pillsbury Winthrop, on behalf of the Embarcadero Asset (sic) Securitization Trust, known as EAST, which is a derivatives counterparty. We filed a -- well, we terminated our swap agreement soon after our counterparty commenced its bankruptcy case, and there was a dispute as to the calculation of our settlement amount. There's been some correspondence but there's still a gap in terms of resolving that dispute.

We did file a limited objection. We certainly have no

objection to there being mediation, and we actually welcome a fair and efficient method of resolving our dispute as well as the many other derivatives disputes. Our concern -- and I should say that in our limited objection we raised about a half a dozen issues, all of which, except for the committee's participation, has been resolved.

And I -- with apologies, we are one of the parties that did not respond to the e-mails that came since the August 26th hearing. But I do have a concern -- we have not withdrawn our objection. I do have a concern with the committee's participation along the lines, I think, that the Court was questioning committee counsel, but I think a question that I would want answered is whether the committee intends to file papers and to present argument to the mediator. We have no objection to the committee attending mediation, consulting with the debtor. We do think that that is an efficient process and a way to avoid having to bring 9019 motions and so forth. And certainly the scope of the existing derivatives orders that have been entered -- this, what I'm suggesting, would be consistent with the previous orders. And I don't read either 1103(c) or 1109(b) as giving the committee the right to be heard in a mediation since it's an alternative to court litigation.

And so I would just ask that the -- any order that is entered allow the committee the consultative observation type

of rule that they ought to have in order to keep the process efficient but that they not be permitted to file papers and address the mediator in argument, as I think that that amounts to essentially a piling-on, which would make the process unfair. Thank you.

THE COURT: Okay.

Are there any other parties who wanted to respond to Mr. Gruenberger's invitation to come up and tell me what a good job Mr. Gruenberger and his people have been doing?

MR. GRUENBERGER: Thanks for the endorsement. Turning --

THE COURT: Apparently very few people want to do that --

MR. GRUENBERGER: Yeah, I --

THE COURT: -- Mr. Gruenberger.

MR. GRUENBERGER: -- I expected that. As to the remaining fourteen, now, objections, Your Honor, we will of course abide by your decision of how to handle it and approach those. You can determine who those fourteen are if you would look, please, at item 10 on today's agenda at pages 6 and 7. And the remaining objectors are designated by letters A through G, and I through P, except for Embarcadero, which just withdrew.

So my recommendation, Your Honor, if you'll permit me --

MR. ANTONOFF: We did not withdraw, just --

MR. GRUENBERGER: Excuse me?

MR. ANTONOFF: We did not withdraw.

MR. GRUENBERGER: Withdraw subject to what was argued by counsel.

Sorry.

THE COURT: Just so the record is clear, when you said "I withdraw", would you just re-identify yourself for the record?

MR. ANTONOFF: Yes, I'm sorry. It's Rick Antonoff with Pillsbury Winthrop, on behalf of the Embarcadero Asset Securitization Trust. Thank you, Your Honor.

THE COURT: Okay.

Anybody else who would like to stand up and withdraw is welcome to do that. I just want to know who's still an active objector. Why don't -- if there's anybody who's out there -- and I don't mean to put any pressure on anybody who's objecting -- who wants now to be off the list of objectors, this is a good time to do that.

MR. GRUENBERGER: Embarcadero, Your Honor, is objector number D on page 6. So the remaining objectors so far are A through C, E through G, and I through P.

THE COURT: I think we have one --

MR. GRUENBERGER: Do we have a candidate?

MR. LAGUARDIA: Yeah.

Your Honor, Daniel Laguardia, Sherman & Sterling, for Bank of America. We informed the debtors before the hearing began that we would withdraw our objections as well.

THE COURT: Fine.

MR. GRUENBERGER: Yeah, they were 8, Your Honor. I had counted them in the --

THE COURT: Okay. So let's just --

MR. GRUENBERGER: -- fifteen.

THE COURT: -- let's just go down the list in the order in which --

MR. GRUENBERGER: Right. Yeah.

THE COURT: -- they're listed.

MR. GRUENBERGER: That was my recommendation, Your Honor, that we go down the list and we see what's left in order of what's on the agenda, if that's okay with Your Honor, and let them come up and tell us --

THE COURT: Okay, Wellmont --

MR. GRUENBERGER: -- and then we can respond.

THE COURT: -- Wellmont Health Systems. Is anybody here or in person or on the phone?

The objection is denied for lack of prosecution.

EPCO Holdings? Mr. Goodman?

MR. GOODMAN: Good morning, Your Honor. Peter Goodman, Andrews & Kurth, on behalf of EPCO Holdings, Inc. Your Honor, EPCO Holdings noted in its response that it did not

object to the concept of mediation. Rather, it submitted that certain of the procedures proposed by the debtors were overly burdensome, unnecessarily complicated and would not facilitate mediation. We believe even after the modification some of those issues exist. Mediation is designed to be a flexible and cooperative process.

THE COURT: What are the specific problems that you have?

MR. GOODMAN: Okay, Your Honor, I'll get to that. We did respond to Mr. Gruenberger on September 1st and then again to Mr. Sinn (ph.) on September 6. One of our concerns is the sanction provisions. Under the sanction provisions, the remedies include basically giving the debtors the relief that they are requesting in their notice. We do not believe that that is proper to put in the mediation order. Rather, we believe that the debtors should rely on general order M-143, which is already encompassed in the proposed order and does allow for sanctions, which would be determined by Your Honor without specifying what those sanctions will be.

In a sense, the parties are agreeing up front that that is a possible remedy, and we don't believe that that is really appropriate for this mediation --

THE COURT: Actually, nobody's agreeing to that. That's going to be, if it's included in the order, an order. So it's, I think, therefore in terrorem effect, and it is

precisely the fact that there is an adverse consequence that may make the process that much more efficient and workable. If parties to this recognize that they are at risk of actually losing, they'll probably show up. I suspect your client will show up if they recognize that there's that risk.

MR. GOODMAN: Our party -- my client does intend to show up --

THE COURT: Great.

MR. GOODMAN: -- and participate in the mediation.

THE COURT: Okay. I'm just going to mention to you that I have no problem with the sanctions as proposed. I've reviewed the order and I'm satisfied with the order in its present form.

MR. GOODMAN: I understand, Your Honor. Thank you. The next issue is the situs of the mediation. We believe that the situs of the mediation should be left up to the mediator. My client is based in Houston. I note that Weil Gotshal has offices in Houston. And rather than setting the mediation in New York, unless other parties agree otherwise --

THE COURT: Well, the adversary proceeding is going to be in New York, so why not the mediation? If your client doesn't agree, you're going to end up in a litigation in this bankruptcy court. This is not a bankruptcy that is happening in Houston --

MR. GOODMAN: I understand.

THE COURT: -- or Los Angeles or Chicago or Maine or Florida. It's happening here.

MR. GOODMAN: I understand, Your Honor, but the mediation -- this is mediation and it's not an adversary proceeding.

THE COURT: I understand, but it's in lieu of an adversary proceeding; hopefully in lieu of.

MR. GOODMAN: The next item, Your Honor, is, we believe, the revised proposed order retains unnecessary time constraints on the initial settlement conference. I noticed that the debtor did amend the time to respond to its request where the debtors would give certain dates for mediation from two business days to four business days, but the order still provides that the parties -- the responding party must respond to one of the dates listed in what the debtors propose by one of the dates that the debtors propose, which is five days from the earliest request.

Again, I just think that this process should be more flexible, particularly with the dates for initial settlement conference. We would like to participate in that conference, and I just asked -- we requested that the debtors give greater flexibility in the timing of that settlement conference.

Lastly, Your Honor, the selection of the mediators. We believe that the counterparties involved in the mediation should have input in the decision-making process of who the

mediator should be out of the pool. That often happens in mediation; in fact, every mediation that I've participated in, the counterparty or the other party to the mediation is involved in the selection process.

THE COURT: Mr. Goodman, I understand your point, and I'm reminded of a case that we had together when I was still in practice that involved the selection of a mediator, and it took months because of conflicts of interest and problems of getting mediators to be willing to participate in that dispute.

This is not standard mediation. This is global mediation. This is an order that will be a one-size-fits-all. That means that the particulars that your client wishes are just wishes. They can't be the rule of the game that the least common denominator becomes what derails the process. In effect, what you're suggesting -- and I appreciate the fact that you're the first person to stand up and formally object after a process that has been designed to make objections like yours go away. I'm disappointed that your objection has not gone away, as I am with respect to the rest of the alphabet that I'm about to hear.

I believe that the process that has been run to get us to this point is a fair one, that the order which has resulted from this process is perhaps not perfect for everyone but it represents an extraordinary achievement under the circumstances and one that I'm prepared to enter.

I'm going to hear everybody's objection as I have heard yours, but just to shorten the process a little bit, everybody should recognize that flexibility is going to destroy the process unless it's for good cause shown within the context of a mediation which has been started consistent with the order.

I am confident that for mediation to work requires give and take, reasonable behavior on the part of everyone who's involved. But to deconstruct the proposed order at the outset is to make the mediation process anything but efficient. And to have mediations happening all over the country, including Houston, or to have mediations with different mediators, each one of which is going to have to get up to speed on the nature of an industry that is itself pretty complex, to me is a recipe for complexity and delay.

For that reason, I don't find any of your arguments compelling. I'm letting you know that now.

MR. GOODMAN: All right. I understand, Your Honor. Thank you.

THE COURT: Okay.

Easton Investments?

UNIDENTIFIED SPEAKER: Easton Investments?

THE COURT: Is there anyone here for Easton?

It's denied for lack of prosecution.

Royal Bank of Scotland? Mr. Bienenstock, good

morning.

MR. BIENENSTOCK: Good morning, Your Honor. Martin Bienenstock of Dewey & LeBoeuf, for Royal Bank of Scotland PLC and its affiliates. Your Honor, we'd certainly listen to what Your Honor has said. And hopefully the reason I still rose to come to the podium to ask Your Honor to give us relief in respect of three points is because of the following. We did not object to the concept of mediation, ADR, et cetera, the Court's power, et cetera. Our objections at all times were designed, number one, for -- to maximize the likelihood of success, and number two, to maintain evenhandedness and fairness. And those are the things that I'm -- the three things that I'm going to be asking Your Honor about now.

There is a provision in the order that goes -- the proposed order, that basically says that participation in the process shall be without prejudice to any parties, jury trial rights, forum selection rights, et cetera. We did respond to Mr. Gruenberger's e-mail, and we made the following comment: Simply add, after "without prejudice to jury trial rights", "Article 3 rights", because a party may not want a jury trial but may still want an Article 3 Court for whatever purpose. That was simply rejected.

In the debtors' response to our initial rejection, it responded specifically to us to say, well, Royal Bank of Scotland filed two proofs of claim attached as exhibits to

their pleading, so they can't even raise this issue because they wouldn't have Article 3 rights. Actually, Your Honor, their attachment of the two proofs of claim proves our point. We have many entities and affiliates: ABN AMRO Bank, ABN AMRO Incorporated, Sempra Energy, et cetera. There are no proofs of claim attached for those entities. The entities that are owed money by the various debtors' estates in many cases are different from the entities they contend owe money to them.

So we have not -- with a lot of bravado, they tried to reject our proposal. But the bottom line is we have not waived our Article 3 rights by filing proofs of claim for most all of the entities that I'm here representing that are affiliates. And it's certainly just basic fairness to add the words "or Article 3 rights" to their reservation of parties' rights on jury trial, et cetera. That's point number one.

Point number two, Your Honor, is, in our initial objection, we asked that the debtor provide counterparties with the same questionnaire answers as the debtor was requesting that counterparties provide when they file proofs of claim. And we were here in August when Your Honor rightly observed that civilized people were at the beach. And we heard Mr. Gruenberger say that that's wrong, the Court ruled on that in another context that we shouldn't get that.

So we tried -- although we don't agree with Mr. Gruenberger's comments, it is important, if this process is

going to be successful, that the counterparties being asked to pay money have information on which to base their request.

The debtors explained the contrast in their initial pleading by saying, well, they need the information because they have a statutory duty under the Bankruptcy Code to review proofs of claim. There's sort of a negative implication that the rest of us responsible to boards of directors and shareholders can just write checks without information, which of course is wrong. So how can we forward the process with the information?

I would also point out, Your Honor, that although the debtor takes great comfort in advising the Court that it's working off of this Court's mediation order, the order, Your Honor, in section 3.1, talks in terms of a Court being able to send things to mediation before the Court's final evidentiary hearing. In other words, the mediation order, the standing order of this Court, contemplates an extant contested matter or adversary proceeding in which discovery is available, and then the Court can send things to mediation, whereby we don't have that process here. We have the ADR mediation process before there's a pending adversary proceeding or contested matter. So there's no proceeding in which to ask for discovery.

So we ask -- in deference to Mr. Gruenberger's statements, even though we don't agree with them, we ask for the following: that if a party gets an ADR notice which is

attached as Exhibit A to their proposed order, which, as Your Honor will see, doesn't require them to provide virtually any data whatsoever except what they voluntarily decide to provide, that a party can respond by saying we can't make a counteroffer without the information that would have been answered in the questionnaire. And before the party gets hauled into a mediation, with the time and expense that that involves, the debtor should provide that information so hopefully then the counterparty has enough to make a counteroffer. We think that's designed to make this process work as opposed to make sure that it doesn't work.

Now, of course the debtor can say, well, if you ask us for information, why wouldn't we provide it? Well, they can provide information that you think of asking for but not the full range in the questionnaire or not -- it's much more comforting to a party if there's a set of information they must provide so you know you're not missing something by some accident. And it's designed to make this work in advance of going to mediation.

So we can't -- finally, Your Honor, appearances. It just doesn't look right from a process point of view. From a -- we hope from a judicial point of view that, when parties file a proof of claim, they have to provide these questionnaire answers, but when the debtors want money from other par -- and that's when -- parties are filing proofs of claim to get

bankruptcy dollars; you know, whatever cents on the dollar are ultimately going to be given. But when they want a hundred cent cash, U.S. dollars, from the rest of us, they don't have to give us information? It just doesn't -- it doesn't seem fair; it doesn't appear fair.

So we think, for all those reasons, there ought to be this safety mechanism in the process where, if a party says I need the information before I make the counteroffer, they have to give it.

My last point, Your Honor, is the committee. As the committee just explained, it deems frivolous, as it just said, counterparties' concerns for confidentiality in having the committee out of the room because the committee is bound by the confidentiality order. Well, Your Honor, the committee has entities on -- financial entities on it that are in the same financial derivatives trading space. They can't keep things confidential from themselves.

So, again, in deference to respecting the role of the committee, generally we suggested a middle-ground sensible approach where the committee can participate, but if in certain -- if in discussions and mediation the counterparty determines that it really wants to tell the debtor something but it's proprietary information, it's sort of like a trade secret trading strategy; they can ask that the committee leave the room. That's just reasonable, and we should have that

right, because there's no way the committee members can keep information confidential from themselves. They'll have it.

Those are our three points, Your Honor. We think they're each designed to promote the likely success, not to detract from it. We think it will promote the appearance of fairness here, and we think it will promote the protection of all parties vis-a-vis the Article 3 point.

THE COURT: Yeah, let me find out from Mr. Gruenberger why he disagrees, if he does, with the things you've just stated.

MR. BIENENSTOCK: Thank you, Your Honor.

MR. GRUENBERGER: I have a direct answer for that question, Your Honor: I disagree one hundred percent with everything that Mr. Bienenstock said, everything.

THE COURT: Why am I not surprised?

MR. GRUENBERGER: I didn't want to surprise anybody. Mr. Bienenstock's opening remark this morning was that he had no question about the Court's power, he was just going to talk about three things. Yet he managed to get seven of his original fourteen objections, many of which had to do with the Court's power, into his later statements that belied his opening remark.

Mr. Bienenstock failed to tell us which of his arguments -- there were fourteen of them -- grounds of objection were withdrawn. I still don't know which are

withdrawn and which are not.

His objection stated that counterparties are entitled to have matters heard by an Article 3 judge. That's flatly wrong. Mr. Bienenstock should know better. He and I participated together in a mediation process in Enron. There was no Article 3 judge involved. Article -- an Article 1 judge created M-143; that was Judge Lifland. An Article 1 judge signed the mediation orders, two of them in Enron; that was Judge Gonzalez. M-143, in its very title and its very words in section 1.3, says you don't have to have any kind of adversary proceeding, any matter a judge -- any dispute an Article 1 judge can send to mediation. That is undisputed.

Mr. Bienenstock says it's a simple fix, just stick in "Article 3" into paragraph 14 along with jury trials. If Mr. Bienenstock has a right to an Article 3 judge at any point for any one of his clients or subsidiaries or affiliates, all he has to do is use Article -- I'm sorry, paragraph 5 on page 5 of the order. It says "All rights, remedies, claims and defenses of a derivatives counterparty and a debtor, in good-faith compliance with the ADR procedures, shall not be impaired, waived or comprised in any further proceedings. In these cases, should no settlement or compromise result from participation in the ADR." That preserves whatever Article 3 rights he thinks he has.

Appearances: For appearances' sake, the debtors ought

to file questionnaire answers. Well, what we tried to do in these procedures, Your Honor, was to have each party, the debtors' side and the counterparties' side and indentured trustee's side, give a brief explanation of what the parties' position is. Not evidence; it's noticed pleading. And we attached forms that gave each side the same amount of information.

Now, Mr. Bienenstock makes an assumption that he wants to create the same exact tit-for-tat goose-for-the-gander proposal that was denied in the bar date order proceedings. The debtors were asked to provide the same things then; didn't happen. Court said no, and now through the side door he wants it.

But let's look at what really in reality this means. Let's assume a counterparty doesn't have a claim at all, never files the questionnaire. We're supposed to file the same questionnaire material for that counterparty? For what purpose?

THE COURT: Well, let me break in and just ask a question about how you envision this process to work, because as I was hearing Mr. Bienenstock's argument on the questionnaire information, he was suggesting that as part of this order there should be some requirement that the debtor, in effect, provide discovery to the counterparty so that the counterparty is informed in a manner that is roughly congruent

with the information that the debtor will have when a proof-of-claim questionnaire has been filed in the case by the bar date.

My impression of how a mediation of this sort needs to function if it's to be successful is that there will necessarily be, if not discovery in the sense that that term is used in an adversary proceeding, the consensual sharing, subject to confidentiality restrictions of information sufficient to support positions.

MR. GRUENBERGER: Absolutely right. Absolutely right.

THE COURT: I assume that there is nothing within the order, as it is presently framed and as it may be reasonably construed, that would limit the ability of the mediator and the parties during the mediation to share such information as is appropriate to facilitate the process.

MR. GRUENBERGER: On the contrary, Your Honor, the order, as it now is constituted, promotes the exchange of information; I'll explain, if I may, how.

THE COURT: I think that would be a useful thing for us --

MR. GRUENBERGER: Right now --

THE COURT: -- to have on the record now.

MR. GRUENBERGER: Right now, if a particular dispute is chosen for mediation, the debtors, in consultation with the creditors' committee, will send what's called an ADR notice. That notice has a couple of things in it. It says here's our

demand for settlement, here's the basis for our demand, and there's a form that is presumptively good that we attach for ease. They don't have to use the form but that's a presumptively good form.

Thirty days -- within thirty days, the counterparty who received an ADR notice responds. That response -- again, we have a form that's a presumptively good form -- says give a brief explanation of either why you don't agree or what more you need, or counteroffer or do anything.

So let's assume an ADR counterparty sends back a response that says I'd love to have a little more information. Now, are we going to go now and try to force a mediation with somebody who says in good faith that they have insufficient information? Of course not. That never happened once in the seventy-seven mediations I had with Mr. Bienenstock in Enron, never once. We didn't have a bar to entry the mediation with discovery. The mediator, a good one, will ask how far the parties are apart; that's one of his first questions after hello, who are you. A good mediator says that. I know that. And if one party says I really don't know what the other side's talking about, we're wasting our time.

So, again, what I said on August 26, in Mr. Bienenstock's presentation there's a presumption that we're in bad faith, that we are going to waste everybody's time. Of course not. We have -- after the thirty days goes by, we're

supposed to have settlement talks. And in the settlement talks, if someone says look, I really don't have the information that you have, help us out, we should have our number-crunchers talking to each other's number-crunchers to make sure that we are on the same page. Every mediation I've been to or I've been party to goes that way. Never has there been a bar to entry like this one, never. And I've never seen an order to that effect at all.

So that's how it's going to work, Your Honor. And to require this gate-keeping role of discovery in advance will impede. We'll have fights about the discovery, we'll have fights -- Your Honor will be bombarded, we won't get anywhere, and we'll be back in the ADR -- I'm sorry, we will be replacing ADR with discovery disputes in an adversary proceeding context. That's exactly what we want to avoid.

Now, once again -- I hope I've answered --

THE COURT: You have.

MR. GRUENBERGER: -- Your Honor's question.

THE COURT: Thank you.

MR. GRUENBERGER: With respect to Mr. Bienenstock's last point about the UCC, they of course will, and will very well, speak for themselves.

But again, from experience, the unsecured creditors' committee plays a good role in mediation. They played that role in Enron. They were not barred. There was no

confidentiality breach. There was no such concern then. I think it's a red herring, totally. They should be involved so that we can get ahead of ourselves, not get behind ourselves, in terms of settlements. That's the purpose of mediation. And to bar them, for reasons that I don't understand -- it's probably beyond my ken to understand that -- I think should be overruled.

So I think all of Mr. Bienenstock's objections should be overruled.

MR. BIENENSTOCK: May I reply briefly, Your Honor?

THE COURT: Yes, and I don't know -- I'm trying to find out if the person who is now anxious to speak is anxious to speak in connection with the Royal Bank of Scotland matter or something else.

MR. SZYFER: Well, Your Honor -- Claude Szyfer on behalf of omnibus derivative counterparties. We also filed an objection with respect to the information balance point. And so I thought, to streamline things, if I could maybe add a couple of comments after Mr. Bienenstock that that would streamline the process, rather than have me go forward maybe a half hour or an hour now and bring up points that may have already been discussed.

MR. GRUENBERGER: Mr. Szyfer's number 10, Your Honor, with one having been eliminated in front. So there's only a few between Mr. Bienenstock and Mr. Szyfer.

THE COURT: Why don't we give Mr. Bienenstock an opportunity to respond. And I think I'm just going to continue to run down the agenda letter by letter. If it's an issue that we've already covered thoroughly, you may not have that much to say.

MR. BIENENSTOCK: Your Honor, on the first point on Article 3, number one, at no time -- contrary to Mr. Gruenberger's statement, at no time did we say every counterparty is entitled to an Article 3 Court. What we said was some are if you haven't filed a proof of claim, as a for-instance.

But, bottom line, what Mr. Gruenberger is now saying to the Court after saying he disagrees totally with what I said, he said my Article 3 preservation right is in paragraph 5 of the order as opposed to paragraph 14, which specifically preserves jury trial rights and forum selection clauses, et cetera.

One way of doing this is for me to, at the appropriate time, carry around a copy of the order and this transcript. There certainly is a question why the other rights in paragraph 14 would not similarly be included in paragraph 5.

So I think (audio distorted) rights in paragraph 14. That said, we could defer to the less good lawyering and use this transcript and Mr. Gruenberger's admission as a solution to the first issue.

THE COURT: Why don't we just defer to the Court on this. And I'm going to tell you that I accept what Mr. Gruenberger has said is the intention of the drafter in respect of paragraph 5 on page 5. And even if it weren't the intent of the drafter, since it's to become the order of this Court, it's my view that the purpose of the global ADR procedures to be made applicable to these various derivative claims are not intended in any respect to alter substantive rights of the parties as they exist today, or tomorrow for that matter. The only way those rights will be altered is if parties enter into binding settlements by virtue of the process that we're now initiating. Whether there are Article 3 rights that a particular counterparty may have, I have no idea. And there's certainly nothing in the order that, at least in my intention, is designed to abridge those rights.

MR. BIENENSTOCK: Thank you, Your Honor. Okay, point number two was the questionnaire. Most of the debtors' reply, Your Honor, really went to providing information in the mediation. Our aspiration was to get the information provided in the first process so you maybe never have to get into the mediation. And certainly there were preparatory statements by the debtor just now that I guess they amounted in sum and substance to the notion that, well, if asked, we'll probably want to provide information, et cetera.

We do not believe that the process should depend on

that in this adversary process. Even though it's an ADR, parties are adversaries. And we think it would be much better if the order expressly protected the counterparties' rights to get that basic information.

We're not talking, Your Honor, about extensive discovery. We're talking about what collateral did you have, what valuation technique did you use to determine your damage claim, what other costs are you referring to; really basic things that we set out in our proposed questionnaire, which was, as Your Honor mentioned, was an analogue to the debtors' questionnaire.

And then -- well, the committee hasn't responded to our last request, so I obviously don't have a reply to that.

THE COURT: Okay.

MR. BIENENSTOCK: One other point, Your Honor, which I think goes -- further supports all of our requests, on page 1 of the debtors' proposed order, the debtors are asking Your Honor to make a finding that there are a lot of common-fact issues in the ADR proceedings that would be initiated under this matter. That itself presents an issue as to, well, when you're called into this ADR, if there are -- and there are going to be setoff issues, I'm sure, that are common -- they mention that in their proposed order as one of the common issues, valuation issues, et cetera -- do you want to settle this before or after the Court gives its rulings on these

issues?

I think if the data is given to the parties that we request in our questionnaire, parties will be much better able to make an educated decision as to whether they're better off settling before this Court determines the so-called common issues or after. So --

THE COURT: This is part of every bankruptcy case, and perhaps it's particularly true of this case given its size, complexity and the number of parties who are involved. We have an example of that very issue today on this morning's docket. A matter was settled as an uncontested matter as item number 6, and I'm about to issue a decision with respect to a contested matter which is appearing after we're done with all of the objections on this list.

Parties take their risks in the flow of a bankruptcy case and they take their risks in the flow of a mediation to make informed judgments as to whether it makes good sense economically to settle or to take your chances behind door number 3 or door number 601.

The ADR procedures do necessarily involve common issues, but just because those common issues are setoff, termination, valuation, computation of termination payments and notice, to list the items that are in the order, doesn't necessarily mean, by the way, that that's the only list of common issues, nor does it necessarily mean that, just because

that's an issue of law or fact to be determined, that it's the kind of thing that will be differently determined if it ends up in litigation. In fact, informed judgment would suggest that you settle something because you're reasonably confident that a thoughtful finder of fact and law will find it a certain way even if it's not the way you want it to be. And --

MR. BIENENSTOCK: That's my point, Your Honor, that you want to have that data that goes to those issues --

THE COURT: Necessarily that data will have to be in front of the parties to the mediation if they're going to reach an agreement, assuming they're represented by you.

Now, I don't know who's going to represent every counterparty. I don't know whether any of these issues in every -- are even pertinent to some of these disputes. Some of these disputes may simply be ornery obdurate behavior, the behavior of parties who need to pay, who want to hold onto their cash for as long as possible. Indeed, I suspect that that is the principal common issue of law or fact that unites all of these disputes.

Like every other bankruptcy case you've ever been in, when you owe money, hold onto it for as long as you can. It's better in your pocket than the debtor's. It's not written down anywhere, but that's how people behave. That's the behavior we're seeking to get to right now, to get to an ADR process that encourages parties to write checks, because the money's in

fact owed. And even if you can come up with some creative reasons as to why the number might be different, get to the table quickly.

So with that being what I consider the most important common issue, I think these ADR procedures are quite appropriately framed.

Now, as to the discovery issue which you mentioned, I believe the mediator is the best party to coordinate the sharing of information. And I see absolutely no reason why there need to be black-letter requirements for disclosure from the debtor, particularly in cases, and I'm not suggesting that this is true of any of your clients or, frankly, any other client represented in the room, but particularly in cases where the only issue is delay.

There really aren't any major issues of dispute. This is a process designed to facilitate the kind of settlement that was achieved in item number 6 on today's agenda. Nine-plus million dollars is being paid over to the estate that should have been paid a while ago. I think there are a lot of counterparties that should take heed, and they can save money ultimately by not participating in ADR but simply writing checks. I'm not suggesting, by the way, that anybody should do that in a situation in which there's a good-faith dispute. That dispute can be resolved in mediation; and if not, here; and if not here, some higher court.

So as to the discovery issue, I'm not moved by your argument. As to the confidentiality issue, I need to hear more from the committee.

MR. BIENENSTOCK: Thank you, Your Honor.

MR. COHEN: Your Honor, as to the confidentiality issue, the committee does not trade in derivatives; it's a statutory fiduciary. As such, it's involved in derivatives issues in these cases every day. The committee members themselves regularly recuse themselves, as appropriate, where they have a competitive interest in the matter at issue.

Further, the expectation is, with respect to those mediations where the committee actually does appear, it would be the committee's professionals rather than the actual members.

Finally, under section 10(b) of the proposed order, the mediator has the broadest possible discretion. In a certain situation, if a counterparty has an issue that it believes should be excluded from the presentation to the committee, it has the power to go to the mediator and ask for that relief. We think it would be inappropriate to give counterparties unilateral right to exclude the committee.

THE COURT: Thank you.

As to the confidentiality issue, I'm satisfied that the committee, for reasons just expressed, as an estate fiduciary, can be bound to confidentiality and in fact, in most

every case that I'm involved in, orders are entered at the outset of the case relating to the sharing of confidential information with the committee and between the committee and third parties, not only in this case but in virtually every other large Chapter 11 in this district.

I'm also persuaded that having the committee actively involved in this process, in a manner that I don't wish to circumscribe by words now but that I think needs to be adjusted on a case-by-case basis, will contribute to the fairness and overall efficiency of the process. So as to that concern, I overrule that objection.

As to the Article 3 issue, which is the first point I've already covered, but with the exception of making clear that Article 3 rights are preserved within the order, the objections of Royal Bank of Scotland are overruled.

The next is Highland Capital Management.

UNIDENTIFIED SPEAKER: Highland Capital Management.

THE COURT: Is anyone here for Highland?

If no one is here to press those objections, those objections are denied for failure to prosecute.

UNIDENTIFIED SPEAKER: Next one is EXCO, Your Honor, E-X-C-O.

EXCO?

THE COURT: EXCO Operating Company, LP?

No response. Denied for the same reason.

Now we get to omnibus objection of derivative counterparties.

UNIDENTIFIED SPEAKER: Yes, Mr. Szyfer.

MR. SZYFER: Thank you, Your Honor, and I'm mindful of what -- the comments that Your Honor just made, so I will keep my comments brief. I have a great deal of respect for Mr. Gruenberger, but with all due respect, I'm still a little skeptical on the information point. And if I can elaborate on an example, I have a client who, as Your Honor has said, has already paid the undisputed amount. We sent a 6(d) letter under the ISDA agreement and said that 5.2 million was due. We were told that that was not the right number, that their number was higher, but we paid the amount. And when I have asked for the information and said, well, let me find out what your numbers are and let me find out what the difference is. I haven't received that information.

And that's why I'm concerned, and that's why I would echo Mr. Bienenstock's concerns that there should be something in the order, whether it's that the mediator has the ability to grant this information or requiring that the debtors at least provide us with the terminated transaction detail that they wanted with respect to the derivative questionnaire so that at least we can have the same opportunity, as Mr. Gruenberger said at the last hearing, to scrub the number. That's really all we're looking for. And the earlier the debtors give that to

us, the more expeditious the process will be.

The debtors are going to give us one raw number pursuant to the derivatives ADR procedures; well, that's what they've done in my case. They've said our number is about 750,000 dollars higher. So it's a small portfolio. But that being said, when I've asked to see where the differences are, I haven't received the same cooperation.

I've provided to the debtors voluntarily to help expedite the process to avoid having to mediate as many mediations as I think I'm going to have to participate in. But that being said, I haven't received the same cooperation, and that's really why I rise, that's why I'm skeptical and that's why I do want something in the order.

THE COURT: Mr. Gruenberger, you've been --

MR. GRUENBERGER: Your Honor --

THE COURT: -- you've been lauded for being someone that is greatly respected, but there's a huge "but" associated with it.

MR. GRUENBERGER: Yes, Rocky Marciano used to smile before the left hook also; I remember that well.

Mr. Szyfer never asked me for any information. He may -- his client may have asked the debtors in the pre-mediation world; I don't know. I assure you, if one of Mr. Szyfer's nineteen clients -- I think there are nineteen -- that he represents on this proceeding gets sent an ADR notice and

they say we don't have the information in good faith, they'll get it.

THE COURT: I'm confident that's true and recognize that that's an essential aspect of the process. To some extent, I gather that objections that have not gone away are durable in part because of some lack of trust that, if it isn't precisely written down in an order that everybody can look to, that the mediations will be one-sided or in some way biased.

I believe that virtually every order that I enter is imperfect in one way or another, largely because I enter so many, largely because even when a document is thoroughly and carefully lawyered there are opportunities for disagreement as to what is intended and because it is the nature of an adversary system to vigorously and zealously pursue claims and defenses in an atmosphere in which while we trust each other there is also a strong desire to win. And so if it is not precisely described, sometimes information is not shared, particularly the information that's embarrassing or that might not support a position.

That being said, I believe that it is important that the mediators be the parties who are most actively involved in managing this process and that we not attempt, by means of a requirement in an order, to impose disclosure or other obligations that frankly are a natural part of the give-and-take in the mediation itself.

To the extent that there is a 750,000 dollar delta between what has already been collected and what might be collected, provided the debtor were to provide information to support the higher number, I must say I'm surprised that there has been any delay in providing the information that would lead to the payment of the 750,000 dollars which is due and owing from an apparently solvent entity that might pay it.

So it's with that understanding that -- Gordon Gekko said it many years ago -- the natural desire of a debtor to collect as much money as it can collect will be the ultimate lubricant for this process. I believe that the debtor will provide information that supports its claims in good faith and that those in a position to respond will seek to contradict or supplement so as to make clear what the right amount is when there's an active dispute. And I leave it to the mediator to not only encourage compromise but to be a voice of reason in the discovery process.

So I see no reason to modify the order formally.

MR. GRUENBERGER: Thank you, Your Honor. I just would like to add a philosophical twist, if I might. One of the benefits of mediation, and there's no benefit in winning because nobody wins in mediation, the benefit to have principals present is for them to hear the other side. So if these side's principals hear the other sides', they come closer; it's inevitable.

And my clients are in the audience today. They've listened to what you've said. I hope the counterparties' principals are listening as well, because that's the only way it's going to work. Winning is not the game. And I agree with Your Honor. Thank you.

THE COURT: Okay.

So I've overruled that objection.

D.E. Shaw?

MR. ROSENTHAL: Good morning, Your Honor. My name is Jeff Rosenthal of Cleary Gottlieb Steen & Hamilton. I actually had not come here to argue on behalf of D.E. Shaw, but my associate, David Livshiz, had planned to. His Southern District admission was scheduled for this morning as well. He's admitted in New York State Court, and with the Court's indulgence I'd like to orally move that he be accepted pro hac to be able to make the argument for D.E. Shaw.

THE COURT: I accept that oral motion and welcome your colleague to the Southern District of New York.

MR. ROSENTHAL: Thank you. I do have one comment; if I could just do it out of turn on behalf of Wachovia, who I was here on behalf of. We do plan, in light of the comments the Court has made this morning, to withdraw the objection of Wachovia. Almost all of it had been resolved. There had been one minor clarification we had sought, but we do take the Court's statements to heart and do withdraw that, and we don't

need the time.

THE COURT: All right, fine. Thank you for that.

MR. LIFSHIZ: Thank you, Your Honor.

THE COURT: Just to be clear, you still have to be formally admitted, you understand that.

MR. LIFSHIZ: I am being admitted next Tuesday. Thank you, Your Honor. I'm here on behalf of D.E. Shaw Composite Portfolios and D.E. Shaw Oculus Portfolios and their respective affiliates.

I've listened very carefully what Your Honor has said today, especially on the sanctions issue which is the one narrow issue on which we have objected, and I rise only because I was here in August and I'm here today, and I've listened carefully, and I haven't heard anyone specifically mention the type of objection that we have. And in two rounds of Mr. Gruenberger's declarations, I have not seen a response specifically to our very narrow objection. And so I wanted to bring it to Your Honor's attention.

Our objection is extremely narrow. We are not objecting to having sanctions in the order. We understand why it's necessary, we understand Your Honor's explanation that having some skin at the line will help parties reach a process. Our objection is on the small point of who should drive the sanction process in the event that a party is not acting in good faith, and we believe -- and we're objecting to the order,

as drafted, because it allows the parties themselves to initiate the sanctions process, rather than a third-party mutual mediator, who's supposed to be there to promote compromise and which is what is provided for in the standing mediation order in this district, and which is the only thing that has been ordered in the two cases which the debtors have cited as precedent in this case. We think that allowing parties to push sanctions on the basis of a nebulous standard as good faith is simply an invitation for more litigation, not less litigation. And therefore, it would undermine the goals of efficiency that Your Honor has articulated today.

THE COURT: Mr. Gruenberger, do you have a response to that?

MR. GRUENBERGER: Yes, Your Honor. Good faith, like obscenity, you know it when you see it.

THE COURT: You got a delayed -- you got a delayed laugh.

MR. GRUENBERGER: I'd like to see the person who can write the encyclopedic definition of good faith in a meaningful way in under 4,000 pages. People know what good faith is. People know what bad faith is. We don't have to write a legislative embodiment. If you're in good faith, nothing's going to happen. But if you blow off the process, if you don't respond to an ADR notice, if you don't show up for a mediation, if you don't return a phone call, that's bad faith. Now, this

can happen even before a mediator gets involved. How does the Court know?

There's going to be no sanctions, as Your Honor has said and as the order, as proposed, states. There will be no sanctions unless there's a hearing on notice and Your Honor makes the decision. Whose to tell Your Honor that that's happened? The mediator might, if he's been involved, sure. But a lot of this can happen before the mediation.

So I don't think that the objection has any substance whatsoever and should be overruled.

THE COURT: I'm going to overrule the objection not necessarily because I'm equating good faith with obscenity, because I'm not, but because the only way that a motion for sanctions can be properly pressed, if it's going to have any reasonable prospect of succeeding, is if there are credible, demonstrable, pretty horrific facts that support the motion. Because it is clear to me that the goal of this ADR process, which has been crafted with considerable care by the debtor in cooperation with the creditors' committee and which currently reflects considerable compromise as a result of the various responses received from counterparties, is a process which is designed to work. As I said earlier today, there may be some imperfections; there always are in documents. But the spirit that underlies this effort is to get people to the table so they can talk to each other with the facilitation of an

independent, neutral party who will help to interpret what the parties are saying to each other. I don't pretend to know how each of these mediations will work, but I do know how mediation generally works, and I have, myself, served as a mediator from time to time. I agree with Mr. Gruenberger that you can tell when a party to a mediation is not acting in good faith. You can tell when a party to a mediation doesn't want to settle. Just because a party doesn't want to settle doesn't mean that it's sanctionable. In fact, it's clearly not sanctionable. This is a consensual process. But if a party is willful and obdurate, unwilling to participate, refuses to show up at a mediation, or acts like Serena Williams at the mediation, that might be sanctionable.

With apologies to Serena, the objection is overruled.

MR. GRUENBERGER: The next one is Taconic Capital Partners, LP. Taconic?

THE COURT: Taconic's objection is overruled for failure to prosecute Barclays Bank, PLC.

MR. LACY: Good morning, Your Honor. Robinson Lacy from Sullivan & Cromwell for Barclays Bank. My main reason for being here is to secure the right of noteholders of CDOs to participate in these mediations. The -- some background is required, although the Court is familiar with the basic structure. We're concerned about derivatives where Lehman's counterparty is a special-purpose entity, typically a Cayman

Island entity. All of the economic interest in that entity is held by noteholders, purchasers of notes issued by that entity. But the entity itself is the swap counterparty; it's the one that terminates or does not terminate the swap. There is normally an indentured trustee on the scene which holds most of the assets as collateral for the notes and has some responsibilities for making payments pursuant to the indenture. Okay? So we're talking about a situation where we have three players on the counterparty side: we have the issuer itself, which is a shell, typically, we have an indentured trustee, which is a bank, somewhere, with no money in the game, and we have the noteholders. Now, in general, in the deals I'm interested in, the noteholders I'm talking about are not people who bought a thousand dollars worth of something to put in an IRA. Barclays owns hundreds of millions of these notes. The notes are issued in classes, and it's normal for the indenture to provide that the senior class is the controlling class, meaning that the majority of the holders of that class can tell the trustee what to do under certain circumstances. There are a number of situations where Barclays owns a majority of the controlling class, so it single-handedly is in a position to tell the indenture what to do. And I am sure that there are many other similar structures where there is another noteholder that I don't know about who is also in a position to tell the indentured trustee what to do.

These big noteholders are, for all practical purposes, the principals, the business principals of the counterparty. And every argument that has been presented, all of which we subscribe to for why the principal should be in the room in a mediation, apply to these noteholders. There are going to be noteholders who are out of the money, who are not interested and shouldn't be there. But if a noteholder is big enough to be interested, to want to turn up, the noteholder should be allowed to turn up.

Now, I thought this would not be controversial. The debtors' omnibus response says on page 17, and I quote, "the participation of trustees, collateral agents, security holders" -- and I assume that means noteholders -- "or other parties that act on behalf of special-purpose entities are necessary and appropriate for meaningful mediation." We could not agree more. We could not agree more that the committee should be involved in these mediations because they have an economic interest in the outcome of these things. The revised order that was issued, I think, shortly after the last hearing modified the confidentiality provisions to allow the indentured trustees to tell the noteholders what had happened in the mediation but did not allow the noteholders into the room.

Remember that these procedures contemplate, essentially, two types of conversations. There is supposed to be an initial settlement conference by telephone, and then

there is supposed to be, if that doesn't work, some sort of a sit-down meeting, okay? And as this thing was drafted, the confidentiality provisions shut out of the room anyone other than the derivatives counterparty as defined, the Lehman entity. Now, the indentured trustee has been let in, but so far, there's a question about the noteholders. Just within the last week, I think it is, there is now a provision concerning an indentured trustee without authority, that is, a trustee that does not have authority to act on behalf of the noteholders, inviting the noteholders to participate. There's still no corresponding provision saying they can actually participate. But there is apparently, still, in Lehman's mind, a class of indentured trustees with authority. Now, one of the ways you get authority under this order is by soliciting instructions from noteholders.

And the Court should be aware that in some of these structures, a Lehman entity claims to be the controlling noteholder by reason of owning unfunded contingent-funding notes that were issued for the purpose of funding payments under swaps that have been terminated. So there is a Lehman entity out there on some of these deals that has no economic exposure on the CDO side, but which it claims, under the documents, is entitled to instruct the trustee and make that trustee a trustee with authority. It is obviously the perspective of the noteholders who have actually put money into

the deal that they're not content to be represented by that sort of a trustee. We would like to be in the room ourself.

I proposed to Mr. Gruenberger that we put in a few words that said -- well, you have to have some provision for telling the noteholders this is happening. That's pretty much been drafted already, but it only applies to the noteholders without -- the trustees without authority. So our proposal is that just as the trustees without authority are now required to notify the noteholders and invite them to participate, all indentured trustees should be required to go through that process -- doesn't require any additional drafting -- and then there should simply be a provision saying any noteholder is permitted but not required to participate as if it were a party. Should be able to be on the telephone calls, should be able to be in the meeting, and this is simply to make sure that the actual economic interest in the CDO is heard when you try to negotiate the settlement.

There are two other smaller points. The first is that in the process of negotiating out the objections for the indentured trustees, the proposed order now has a dual set of deadlines which we submit are unworkable and prejudicial to noteholders. If one of the commencing documents, I guess it's called a notice, is served on the issuer and the indentured trustee -- and they're required to be served on both -- of one of these vehicles, then the issuer is required to respond in

thirty days, the indentured trustee is not required to respond for forty-five days, and the process for giving notice to the noteholders won't necessarily have played out even at that point. So you may have the issuer putting in a response which will affect the right of the noteholders before the noteholders are on the scene and before the indentured trustee is participating. And then, in the what have become very complicated provisions regarding the scheduling of the initial telephone call, the initial settlement conference, it's now set up so that a party other than an indentured trustee will get through that process in no more than twenty-four business days. But if it is an indentured trustee asking for a settlement conference, it can take -- it can actually take forty business days, eight weeks, before you actually get to the conference. It makes no sense to have these separate schedules; presumably, there should be one conference involving everybody, and it shouldn't happen until after the noteholders have had a chance to get there. I think the simple thing is these are big deals. If there's an indentured trustee on the scene, there's a lot of money at stake; the issues are complicated. You should just take the indentured trustee schedule and apply it to everybody for those.

The final point is a simple one. The general order that now applies to mediations in this district says that a Court can send something to mediation any time, but if a party

wants to make a motion to send something to mediation, which is how the party invokes the procedure, it has to be made promptly after the filing of the first piece of paper in the contested matter or adversary proceeding. The entire motion is presenting mediation as an alternative to litigation, and of course, that's what it's supposed to be. One of the innovations that Barclays agrees with is that the order makes clear that a mediation can be commenced before there is any litigation pending, before any motion has been made or before any complaint has been filed, and that should allow plenty of time for this process. Barclays objects, however, to the change in the existing procedures that is accomplished by the proposed order that it now allows the debtors to start this process at any time during the pendency of an adversary proceeding. Our suggestion is that they should be subject to essentially the same deadline that applies now, that is, no later than shortly after the filing of the initial paper starting litigation.

As you've just heard from the schedule, these mediations can take a while. Our experience is it's extraordinarily difficult for the Court to be called upon to actually make substantive decisions or try cases in the middle of a mediation. So either the mediations started late in the case will be pointless or they will delay the case, and neither is a satisfactory outcome. There is no good reason for not

requiring that any mediation be begun prior to the commencement of litigation or immediately after the commencement of litigation, and we'd like to see the order modified to accomplish that.

THE COURT: So you're looking for a sunset date with respect to the effectiveness of the order?

MR. LACY: Not with respect to the order.

THE COURT: In terms of -- as it applies to a mediation in any particular dispute.

MR. LACY: The idea is that this -- of course, the Court can send something to mediation. The precise thing that I proposed to Mr. Gruenberger is that if someone wants to start a mediation after the deadline set out in the general order, which is immediately after the commencement of the formal litigation, that person should have to apply to the Court to get permission to start.

THE COURT: Well, maybe I'm missing something, and it's your last point of a number of points.

MR. LACY: That's the last point.

THE COURT: So let me just react to the last point, and then give Mr. Gruenberger an opportunity. My notion as to how these procedures are intended to work is that, largely, they will be deployed prior to the commencement of any adversary proceeding and that an adversary proceeding will be the default mechanism of a failed mediation process. That

doesn't necessarily mean that after an adversary proceeding has been commenced, that a return to mediation might not be possible. Nor does it mean, necessarily, that as to certain disputes that may not be subject to ADR, once an adversary proceeding has been commenced, at some point in that process, mediation may turn out to be desirable, either pursuant to M-143, pursuant to this order, or pursuant to an order that's crafted for the particular dispute before me.

I don't understand why you're concerned about this. Are you concerned that at some point we get deeply into an adversary proceeding and you're concerned about delay with respect to that adversary proceeding?

MR. LACY: Both delay and some informal discovery requiring us to disclose our litigation strategy. Yes, Your Honor. If we get to the eve of trial, under these procedures, unlike the general order, the debtor has complete discretion to start one of these proceedings. And we would prefer not to have it in the arsenal of the people we are litigating against to force us into a meeting where we had a discussion concerning our views of the case shortly before we're preparing for trial, both because that's unfair, and also because it is likely to delay the disposition of the case.

THE COURT: Okay, I understand your position on that. Mr. Gruenberger, what do you say about all this?

MR. GRUENBERGER: Mr. Lacy did indeed make proposals

to me under Federal Rule of Evidence 408, so I wasn't going to comment about our discussions. But since he has chosen to breach 408, I will respond. Let's take the last point.

THE COURT: Well, this isn't evidence. We're just having an argument. We're just having an argument in which I'm trying to get through a long list of objections, and this is not the last one.

MR. GRUENBERGER: I'll take his last point, first, Your Honor, and I appreciate the caution.

143, M-143, the standing mediation order, which Mr. Lacy uses when he likes it but doesn't use it when he doesn't like it, provides a procedure in itself, paragraph 3.6, that says if a party wants out of a mediation because it's inappropriate for any reason for cause shown, he shall make an application to get out of it. Again, you heard the presumption that we're going to do something in bad faith in the middle of a case, like Ballyrock, which Mr. Lacy's client is a party in, and therefore, either delay it or use mischief on discovery. That should not control this, Your Honor. 143 gives a way to get out. We shouldn't have another gate-keeping barrier to starting a mediation.

However, and I think Your Honor answered that question appropriately, and I'll move on to his other two points. On September 2nd, which is almost two weeks ago, we resolved, with the indentured trustees, that Mr. Lacy talks about. We

incorporated a new provision, 5B, into the order. It's on page 5 and 6. And there it said if an indentured trustee receives an ADR notice, the debtors and that trustee sit down and look at the governing documents. If the indentured trustee has authority to participate and settle on behalf of noteholders, then we go forward. If, however, there is no authority through those documents, then the indentured trustee has some obligations to perform in good faith, and that's to advise all those holders of the dispute, advise them that we have this ADR notice, invites them to participate in the procedures as an alternative to litigation, and encourages them to communicate with the debtors, and offers to take the noteholders' direction in terms of participation and settlement.

I don't know what more noteholders could get than that. The indentured trustees -- you've heard this many times and in many different contexts, already -- have responsibilities. We try to meet those concerns and those responsibilities to get the noteholders in, and they are in. There's nothing more we can do with respect to that, whatsoever, Your Honor.

In terms of the time periods, this is another case of no good deed goes unpunished. So we doubled all the time periods for everybody, and gave the indentured trustees extra time so they could do this communications with the noteholders to protect the trustees and the noteholders. That's not good

enough. Again, some noteholders seem to want more. We'll be into next July before we can even start a mediation if we keep extending these deadlines. Everyone of these deadlines was increased at the request of people. We can't go further because it won't work.

And I have nothing more to say about Mr. Lacy's objections.

MR. LACY: May I reply, very briefly, Your Honor?

THE COURT: Yes, very briefly.

MR. LACY: On the last point, the proposal I made concerning the timetable would not extend the mediation process at all. I'm simply saying that the issuer would have the same amount that they have already given to the indentured trustee to respond to the ADR notice. So it's not as if they're going to go ahead and do this mediation or get it down immediately after the issuer turns in his thirty-day response. They're obviously going to wait the forty-five days for the indentured trustee. Why not give the issuer the same forty-five days? They can't do anything in the meantime. I'm not proposing any delay at all.

And on the first point, all we're asking for is that the noteholders get the same treatment for -- when there is an indentured trustee with authority -- that they have provided when the indentured trustee lacks authority. Because whatever the legal documents say, the indentured trustees are the

principal. They are the ones with the economic interest. It is Mr. Gruenberger's assertion --

THE COURT: You don't -- you mean the noteholders are the parties with the economic interest.

MR. LACY: I'm sorry, what did I say?

THE COURT: You said the indentured trustees.

MR. LACY: I'm sorry, the noteholders, that's correct, are the parties with the economic interest.

THE COURT: Are you just seeing if I'm listening after the --

MR. LACY: I have to say, you're more alert than I am, Your Honor.

THE COURT: All right.

MR. LACY: The provision that Mr. Gruenberger just told you about only applies -- and we're completely happy with this procedure -- but it only applies to an indentured trustee that lacks authority. There is no good reason not to make the same procedure apply to an indentured trustee that has authority to ensure that the noteholders with the real economic interest are in the room.

MR. GRUENBERGER: There is a very good reason, Your Honor, and this is what it is. Their authority was given by the noteholders to the trustee that says trustee, I trust you. You do the job for me. You're getting paid for this, you're careful, I trust you. Now, we're going to have that trustee

have to battle his own noteholders in the same proceeding because they're in there, too, second-guessing, creating who knows what kind of at least noise, time, effort, and maybe chaos. What does authority mean? It's meaningless when they have to attend to piling it on the debtors. I think that's the only answer that counts.

THE COURT: But what I'm hearing may be chaos because, if I understand what Mr. Lacy is saying on behalf of his nonclients, the noteholders, because he represents Barclays Bank, PLC, but he's here saying we're concerned in our capacity as indentured trustee in a variety of transactions -- is that right?

MR. LACY: Your Honor, Barclays Bank is a noteholder. I'm here on behalf of a noteholder.

THE COURT: But are you also concerned about Barclays in respect of any other --

MR. LACY: No, Barclays is not, as far as I know, an indentured trustee.

THE COURT: Okay.

MR. LACY: We're here entirely on behalf of noteholders.

THE COURT: But you're speaking only as Barclays may represent the interest of other noteholders, or are you speaking about Barclays? Because obviously you know what --

MR. LACY: No, I'm speaking about Barclays. I want

Barclays to be in the room for the mediations affecting its CDOs.

THE COURT: Okay. I misunderstood. I thought you were speaking on behalf of Barclays but also speaking about a class of undefined noteholders in different transactions.

MR. LACY: Barclays owns hundreds of millions of dollars of notes issued by CDOs that are counterparties to derivatives with Lehman. Barclays feels, like any principal, that if its money is being talked about, it would like a chance to participate in the process.

THE COURT: What does that have to do with this order, though? I mean, if you -- if you send a letter to debtors' counsel and say listen, we have major economic interests here, and we want to be heard in any mediation that involves the following CDOs --

MR. LACY: Um-hum.

THE COURT: -- whatever they may be, so if there's a mediation, we want to be in the room, just like the creditors' committee, and we'll sign confidentiality agreements if that's necessary, I suppose there are two responses to that. One is, come on in. The other is, you're just a lot of noise; you have no legal right to be here. I'm not sure what the answer's going to be. But presumably, if the debtor is motivated to have a process that leads to a yes, as opposed to a no at the end of the mediation, they're going to want a party that has a

significant influence over the outcome, or perhaps the ability to bind a trustee, to be in the room. Correct?

MR. LACY: At the moment, the confidentiality provisions of the order prohibit anyone -- would prohibit the noteholders from being in the room. Are you saying that we should just count on the debtors to waive that?

THE COURT: No, I'm suggesting that, first of all, you are objection L in a list of objections that started with A, and it's just about noon time.

MR. LACY: Your Honor, I will sit down.

THE COURT: No, I'm not asking you to sit down. I'm just trying to understand the issue that's before me right now and why you're pressing this hard, and why the debtor is pressing hard against you. The idea is for the ADR procedures that we're adopting to be productive and workable. The number of objections that this proposal produced suggests that this is a subject as to which reasonable people may differ, have differed. We're now down to a fairly narrow issue that particularly affects your client, but also others similarly situated to your client, i.e., noteholders in CDOs that are either known or unknown. You happen to be a known noteholder.

MR. LACY: Um-hum.

THE COURT: I don't know, for purposes of whatever the dispute may be that is the subject of an ADR request in the future, whether or not it is desirable or undesirable for you

or people like you to be in the room. I just don't know. I assume that it would be desirable, if you have hundreds of millions of dollars worth of notes and are in a position in various structures to direct activity, and that presumably, if it gets in the way of progress for you to not be in the room, you'll be invited in, and if it gets in the way of progress for you to be in the room and to make noise, you won't be invited in. I'm just assuming that. Mr. Gruenberger, do I understand this or don't I?

MR. GRUENBERGER: I think you do very well, Your Honor. I'm not predicting, yes or no, whether there will be noise. I just posited a situation where there could be noise. And I'm not asking that Mr. Lacy's client fire all their trustees, either, in order to get into the room. I'm not suggesting that at all. But let's see what happens when the trustee with authority responds to an ADR notice and what happens if Mr. Lacy does, in fact, take up Your Honor's suggestion to notify us, saying they would like to attend. I'm not an unreasonable person, as a lawyer, and I don't think my client --

THE COURT: None of the --

MR. GRUENBERGER: -- will be unreasonable, either.

THE COURT: And --

MR. GRUENBERGER: Or as a person.

THE COURT: This is a federal court you're saying this

in, you realize that? Okay, and I think it's true that most of us view ourselves as being not unreasonable. I'm going to overrule the objection of Barclays Bank with the observation that this is less about whether or not particular language ends up in the current iteration of this order, and more about getting the attention of the right people who need to participate in the process and make decisions that are well-informed and that are designed to efficiently dispose of disputes prior to litigation. I hope that these procedures will be interpreted in that spirit and because I know that these transcripts are carefully reviewed after the fact for hidden meaning, let me be clear that there's no hidden meaning in this comment, that I expect that the procedures will be applied in a manner designed to expedite and facilitate the resolution of disputes in good faith and that parties will not be kept away arbitrarily if their involvement may facilitate such positive outcomes.

By the same token, this is not a free-for-all. And the structures about which we are now making room in the order and trying to accommodate are, themselves, extraordinarily complex. And I'm unable to tell you now whether or not the CDO indentures are all cut from the same cloth or cut from different cloth. And to the extent that these are different complex highly-structured vehicles, I think it is really not a good idea to try to pick arbitrary deadlines or parties for

purposes of an efficient process. Once again, I think this is a matter that can be left to the informed discretion of the mediator once the mediator has a dispute before him and her.

In that spirit, I overrule the Barclays Bank objection.

M is a limited objection of CIBC and Societe Genera --

MR. GRUENBERGER: Societe Generale and CIBC together.

MR. TREHAN: Good afternoon, Your Honor. Amit Trehan, Mayer Brown LLP, for Societe Generale and certain of its affiliates, CIBC and certain of its affiliates. We'd like to clarify that the objection, our objection, was previously fully withdrawn with respect to certain affiliates thanks to the communicative and open efforts of the debtors and we take your comments fully to heart and would withdraw the objection with respect to the remaining objectors as part of our objection.

THE COURT: Okay.

MR. TREHAN: Thank you.

THE COURT: Fine, thank you. Next is N, objection of Lai Mei Chan and others.

MR. GRUENBERGER: These are the Wong mini-bonds plaintiff, Your Honor.

THE COURT: Is there anyone here on behalf of that purported class of plaintiffs? Apparently not; that objection is denied for failure to prosecute.

MR. GRUENBERGER: Compass Bank.

THE COURT: Again, I hear no comment on behalf of Compass. That objection is overruled for failure to prosecute. And we're down to --

MR. GRUENBERGER: There are none left, Your Honor.

THE COURT: -- we're down to P, which was already dealt with. And so we've gotten through the list and I'm prepared to enter the order.

MR. GRUENBERGER: Your Honor, I'd like to hand up the order. There is one matter, however, that we have not yet been able to fill in, and that is the identity of the mediators. And it is still blank in paragraph 10, and I will hand up the order. And whatever Your Honor wishes to do in that regard in communicating with us the identities is fine. But, I leave that to Your Honor.

THE COURT: All right, thank you.

MR. GRUENBERGER: May I approach?

THE COURT: Please approach.

MR. GRUENBERGER: This is an unblacklined version, Your Honor.

THE COURT: It's an unblacklined version of a document that doesn't have a disc attached to it, so it's of no use.

MR. GRUENBERGER: We have a disc, Your Honor.

THE COURT: Okay, fine. All right, it's ten after 12, and I have indicated my intention to enter the alternative dispute resolution procedures order substantially in the form

that it has been presented and will make some judgments as to the identity of the mediators in consultation with counsel for the debtors and for the creditors' committee who have been so active in developing these procedures.

I recognize that a lot of people who are in court at this moment are here for the ADR procedures, and I'm going to give people who want to leave an opportunity to leave. I'm also going to give everybody an opportunity for a break. But because of the congestion of this docket, I think I'm going to go until 1 o'clock. So let's take a break for ten minutes, and then resume, and then go until 1 o'clock and then break for lunch. We're adjourned until then.

MR. GRUENBERGER: Thank you, Your Honor.

(Recess from 12:12 p.m. to 12:28 p.m.)

THE COURT: Be seated please. Number 11, Metavante.

MR. SLACK: Your Honor, Richard Slack from Weil, Gotshal for the debtors. We're here on the debtors' motion to compel performance of Metavante Corporation. As Your Honor knows, two months ago we had argument, after fully briefing the issue. Your Honor is in receipt of letters from both Metavante's counsel and from the debtors, which I think provides the status of where we are in terms of discussions, which is, essentially, that the parties have not had substantial discussions, as the letters which are docketed state.

The debtors were requested to make a proposal to resolve it, which we did. We have not received a proposal from Metavante in the two months since the hearing, and Metavante has not responded to our proposal that we've made.

Your Honor has mentioned Metavante a couple of times today, and so Your Honor may have a plan for the conference, but it is the debtors' position that this matter should be considered and decided, at the Court's discretion, obviously.

THE COURT: Understood. I'm ready to rule today.

MR. ARNOLD: May it please the Court, mindful of that comment, I want you to know why we wrote the letter, so that you have in mind that parties do take into account the risks of not settling, and you were quite clear at the hearing on July 14th that there was an opportunity for the parties to consider resolving this matter.

For the Court's information, neither Lehman nor its counsel have been obdurate, ornery, or in any fashion unprofessional. Our dealings have been quite, to the contrary, exceptional throughout the history of our relationships. I reached out to counsel for the debtors to explain how it is that an impending transaction which will close on October 1st would, in my judgment, have a favorable impact on the likelihood of this matter resolving consensually. That was the singular purpose for us writing the letter to the Court. We are not here today to reargue the motion. The Court heard

extensive oral argument. It has been well briefed. The issues have come up again in, frankly, in other instances and motions and adversary proceedings. I wanted the Court to know that it was not by design, neglect or deliberately ignoring your comments on July 14th that the settlement has not proceeded further than it has. About a week ago we received a settlement proposal. I am authorized to state by both Fidelity and Metavante that post-closing of the merged entity we expect to, and intend to, and will make a settlement proposal, but we're also mindful that it hasn't been settled, and if it is the Court's desire to rule on the matter today, we govern ourselves accordingly. I just wanted the Court to know what I've done since July 14th to try to move this matter on.

THE COURT: Okay. Thank you for that update.

MR. ARNOLD: Thank you, Your Honor.

THE COURT: The Metavante matter consumed the better part of an afternoon's oral argument. My best recollection is that we specially listed it on the afternoon before the July omnibus hearing. Candidly, I don't recall why it was specially listed all by itself, but it's just as well that it happened, because it took a lot of time.

It's correct that I encouraged the parties to attempt to resolve this consensually, and I appreciate the fact that large enterprises, particularly those that are involved in major transactions in which acquisitions are literally weeks

away from being consummated, may be distracted or may have other priorities. But I also believe that when I suggested that this be listed for the September 15th omnibus hearing it was with the notion that, in effect, time would be up.

I'm also mindful of the fact that on today's calendar a matter very similar to this, item 6, has been consensually resolved, involving the payment of fifty percent more dollars to the debtors than are at issue in this current dispute.

I am prepared to rule and will do so now. Recognize that what I'm about to do will take some time and will probably take us to the lunch hour. If there is anyone here who doesn't want to hear the ruling in this case I'd like you to be free to both leave, because I won't be offended, or, if at some point during my rendition of this ruling you say to yourself this is something I don't need to hear, you're also free to leave at that point.

LBSF requests that the Court compel Metavante to perform its obligations under that certain 1992 ISDA Master Agreement dated as of November 20, 2007, defined as the "Master Agreement". And that certain trade confirmation dated December 4, 2007, defined as the "Confirmation", and together with the Master Agreement, the "Agreement".

The Master Agreement provides the basic terms of the parties' contractual relationship and contemplates being supplemented by trade confirmations that provide the economic

terms of the specific transactions agreed to by the parties. Under the Master Agreement, Metavante and LBSF entered into an interest rate swap transaction, the terms of which were documented pursuant to the Confirmation.

LBHI is a credit support provider for LBSF's payment obligations under the Agreement.

Due to declining interest rates the value of LBSF's position under the Agreement has increased. As of May 2009, under the payment terms of the Agreement, Metavante owed LBSF in excess of 6 million dollars, representing quarterly payments due November, 2008, February, 2009 and May, 2009, plus default interest in excess of 300,000 dollars.

It is possible that due to current market conditions and to the quarterly payment schedule prescribed by the Agreement the amounts that Metavante owes to LBSF as of today are even higher than those stated in the motion. Metavante has refused to make any payments to LBSF. In fact, it has refused to perform its obligations under the Agreement, as of November 3, 2008. Instead, Metavante claims that LBSF and LBHI, via the filing of their respective Chapter 11 cases, each caused an event of default under the Agreement.

Metavante argues that due to such events of default it has the right, but not the obligation, under the safe harbor provisions of the Bankruptcy Code, to terminate all outstanding derivative transactions under the Agreement. Metavante also

maintains that it is not otherwise required to perform under the Agreement.

The parties presented their arguments to the Court at a hearing held on July 14, 2009. Notably at the hearing counsel to Metavante stated that, quote, "the opportunity to settle the matter", is a possibility. The reference in the transcript is page 58, lines 18 to 19. The Court took the matter under advisement and suggested that it be calendared for the September 15, 2009 omnibus hearing for purposes of either a bench ruling or a status conference on any progress the parties may have made towards a resolution.

I want to make clear that I am proceeding with this ruling because I view the letter described by counsel for Metavante, which talked about a possible settlement counterproposal occurring sometime after the closing of a merger on October 1, as being an insufficient commitment to a timely settlement.

On September 14, 2009 the Court received letters from counsel to each of the parties. Counsel to Metavante requests an adjournment to October 14. Counsel states that an adjournment will facilitate the parties' settlement negotiations but explains that Metavante may not make a counterproposal to LBSF's September 5, 2009 settlement proposal until after the proposed October 1, 2009 closing of a merger. Counsel also suggests that an adjournment will allow the Court

to put the motion on the same track as two other motions currently pending before the Court. Which motions, counsel claims, raise similar issues to the motion? Counsel to LBSF and LBHI maintain that inasmuch as Metavante has done nothing since July 14, 2009 to settle this matter other than asking LBSF and LBHI to make a settlement proposal, the parties are no closer to settlement than they were at the hearing, and, therefore, the status conference should go forward as planned.

While each of the matters reference by counsel to Metavante may have overlapping issues with those presented in the current dispute, each matter involves its own distinct set of fats. Moreover, each of the two referenced matters is in its infancy. No response has been filed in either one, which may further delay resolution here.

This is a dispute that has been fully briefed and argued and is ripe for determination. Moreover, I note that the settlement that was achieved with MEG Energy that was referenced this morning indicates that parties who are willing to settle can, and do.

Under the Agreement LBSF is obligated to pay the floating three month USD LIBOR BBA interest rate on a notional amount of 600 million dollars, which notional amount declines over time, beginning in May, 2010. Metavante, in turn, is obligated to pay a fixed interest rate, 3.865 percent, on the notional amount. The Agreement is set to expire on February 1,

2012. The Agreement defines event of default to include the bankruptcy of any party or credit support provider. Under the terms of the Agreement, upon an event of default the non-defaulting party may designate an early termination date. Upon termination a final payment is calculated and paid in order to put the parties into the same economic position as if the termination had not occurred.

In the instant case Metavante has refused to perform under the Agreement on account of the event of default that has occurred, and is continuing, on account of the bankruptcies of LBSF and LBHI. Metavante has not, however, attempted to terminate the Agreement. Instead, Metavante entered into a replacement hedge covering the period from November 3, 2008 through February 1, 2010.

LBSF and LBHI argue that the Agreement is an executory contract because material performance, specifically payment obligations, remain due by both LBSF and Metavante. Under Bankruptcy Code Section 365(a) a debtor in possession may, "subject to the court's approval, assume or reject any executory contract". The case law makes clear, however, that while a debtor determines whether to assume or reject an executory contract the counterparty to such contract must continue to perform.

LBSF and LBHI further argue that the safe harbor provisions do not excuse Metavante's failure to perform.

Indeed, the safe harbor provisions permit qualifying non-debtor counterparties to derivative contracts to exercise certain limited contractual rights triggered by, among other things, a Chapter 11 filing. They're available, however, only to the extent that a counterparty seeks to one, liquidate, terminate or accelerate its contracts or two, net out its positions. All other uses of ipso facto provisions remain unenforceable under the Bankruptcy Code.

Notably, Metavante does not dispute that it has failed to perform under the Agreement. Instead, Metavante argues that the occurrence of an event of default under the Agreement gives rise to its right, as the non-defaulting party, to terminate under the safe harbor provisions. According to Metavante the occurrence of an event of default does not, however, create the obligation for it to terminate under the safe harbor provisions. Metavante emphasizes the term, quote, "condition precedent" set forth in Sections 2(a), 1 and 3 of the Agreement, which subject payment obligations to the condition precedent that no event of default with respect to the party has occurred and is continuing.

Metavante argues that under New York State contract law a failure of a condition precedent excuses a party's obligation to perform. Metavante states that its unequivocal right to suspend payments until the termination of the Agreement is fundamental to the manner in which swap parties

government themselves. Metavante takes issue with LBSF and LBHI in asking the Court to treat the Agreement like a garden variety executory contract, arguing that it cannot be compelled to pay because LBSF and LBHI cannot provide the essential item of value Metavante bargained for, namely an effective counterparty.

Metavante further argues on information and belief that LBSF and LBHI also are in default under certain unspecified indebtedness that allegedly may have created a cross default under the Agreement, asserting, as a result, an alleged need to engage in the discovery process.

It is clear that the filing of bankruptcy petitions by LBHI and LBSF constitute events of default under the Agreement. Specifically, Section 5(a)(vii) of the Agreement provides that it shall constitute an event of default should a party to the Agreement or any credit support provider of such party institute a proceeding seeking a judgment of insolvency or bankruptcy, or any other relief under any bankruptcy insolvency law or similar law affecting creditors' rights.

Section 2(a)(i) and 3 of the Agreement, in turn, subject payment obligations to the condition precedent that no event of default with respect to the other party has occurred and is continuing. It is also clear, however, that the safe harbor provisions, primarily Bankruptcy Code Sections 560 and 561, protect a non-defaulting swap counterparty's contractual

rights solely to liquidate, terminate or accelerate one or more swap agreements because of a condition of the kind specified in Section 365(e)(1), or to "offset or net out any termination values or payment amounts arising under or in connection with the termination, liquidation or acceleration of one or more swap agreements". That language comes from Section 560.

In the instant matter Metavante has attempted neither to liquidate, terminate or accelerate the Agreement, nor to offset or net out its position as a result of the events of default caused by the filing of bankruptcy petitions by LBHI and LBSF. Metavante simply is withholding performance, relying on the conditions precedent language in Sections 2(a)(i) and (iii) under the Agreement.

The question presented in this matter and the issue that was argued by the parties at the hearing is whether Metavante's withholding of performance is permitted, either under the safe harbor provisions or under terms of the Agreement itself. It is not.

Although complicated at its core the Agreement is, in fact, a garden variety executory contract, one for which there remains something still to be done on both sides. Each party to the Agreement still is obligated to make quarterly payments based on a floating or fixed interest rate of a notional amount, it being understood that the net obligor actually makes a payment after the parties respective positions are calculated

on a quarterly basis, in February, May, August and November of each calendar year.

Under relevant case law it is clear that while an un-assumed executory contract is not enforceable against a debtor, see NLRB v. Bildisco & Bildisco, 465 US 513 at 531, such a contract is enforceable by a debtor against the counterparty. See McLean Industries, Inc. v. Medical Laboratory Automation, Inc., 96 B.R. 440 at 449 (Bankr. S.D.N.Y. 1989). Metavante relies on In re Lucre, Inc., 339 BR 648 (WD Mich.) for the proposition that a debtor's uncured pre-petition breach of its executory contract, here the event of default caused by the bankruptcy filings of LBHI and LBSF, will, in and of itself, justify continued nonperformance by the non-debtor counterparty, and mere commencement of bankruptcy proceedings and the imposition of the automatic stay does not empower the debtor to compel performance from a non-debtor party.

The Court rejects the Lucre decision as nonbinding and non-persuasive. While Metavante's argument for the events of default caused by the bankruptcy filings of LBHI and LBSF do create an obligation for it to terminate the Agreement under the safe harbor provisions, that's a tenable argument. Its conduct of riding the market for the period of one year, while taking no action whatsoever, is simply unacceptable and contrary to the spirit of these provisions of the Bankruptcy Code.

First, inasmuch as the Bankruptcy Code trumps any state law excuse of nonperformance, Metavante's reliance on New York contract law is misplaced. Moreover, legislative history evidences Congress's intent to allow for the prompt closing out or liquidation of open accounts upon the commencement of a bankruptcy case. Citation is to the Congressional history of this, H.R. Rep. 97-420 at 1 (1982), as well as its stated rationale that the immediate termination for default and the netting provisions are critical aspects of swap transactions and are necessary for the protection of all parties in light of the potential for rapid changes in the financial markets. Citation to the Senate Report number 101-285 at 1 (1990).

The safe harbor provisions specifically permit termination solely, quote, "because of a condition of the kind specified in Section 365(e)(1) that is the insolvency or financial condition of the debtor and the commencement of a bankruptcy case. See also In re Enron Corp., 2005. WL 3874285, at *4, Judge Gonzalez's case, 2005. Noting that a counterparty's action under the safe harbor provisions must be made fairly contemporaneously with the bankruptcy filing, less the contract be rendered just another ordinary executory contract.

The Court finds that Metavante's window to act promptly under the safe harbor provisions has passed, and while it may not have had the obligation to terminate immediately

upon the filing of LBHI or LBSF, its failure to do so, at this juncture, constitutes a waiver of that right at this point.

Metavante's references to defaults under certain unspecified indebtedness that allegedly may have created a cross default under the Agreement are of no moment. First, Metavante failed to set forth the basis, either in its papers or at the hearing, for its information and belief that such a default may have occurred. Its assertion that such a default may have occurred indicates that Metavante is not aware of any such default, and, therefore, did not rely on that default in its refusal to perform under the Agreement or lacks knowledge of what that default may be.

Additionally, the argument that LBSF or LBHI may have defaulted under other specified indebtedness, as that term is defined in the Agreement, relies upon the financial condition of bankruptcy debtors to withhold performance. That is also unenforceable as an ipso facto clause that may not be enforced under the Bankruptcy Code Section 365(e)(1)(A).

LBSF and LBHI are entitled to continued receipt of payments under the Agreement. Metavante's attempts to control LBSF's right to receive payment under the Agreement constitute, in effect, an attempt to control property of the estate. See In re Enron Corp., 300 B.R. 201 at 212 (S.D.N.Y. 2003), recognizing that contract rights are property of the estate and that therefore those rights are protected by the automated

stay.

This is a violation of the automatic stay imposed by Code Section 362. Accordingly, for the reasons set forth in LBSF's and LBHI's papers, for the reasons stated on the record at the hearing and for the reasons stated on the record today, pursuant to Bankruptcy Code Sections 105(a), 362 and 365, Metavante is directed to perform under the Agreement until such time as LBSF and LBHI determine whether to assume or reject. That's the ruling of the Court.

MR. KRASNOW: Good afternoon, Your Honor. Richard Krasnow, Weil, Gotshal & Manges, for the Chapter 11 debtors. We are close to the end of this morning's agenda, but not quite there as yet. The next item, Your Honor, is number 12. It is the motion of DnB Nor Bank described in the agenda. Your Honor, that matter has been fully submitted to the Court, fully briefed, arguments held on November 5th, and today is the scheduled status conference.

THE COURT: Okay. I'm ready to rule on that, but given the hour I'm not going to take the time to do that now. But we'll issue a short memorandum in due course. So as to not create any undue suspense for those parties who are here in connection with the DnB Nor matter, I am deciding that in favor of the debtors and against DnB Nor, denying DnB Nor's motion for allowance of an administrative expense claim, substantially for the reasons set forth in the committee's papers.

I have considered the supplemental briefs relating to the question that I had raised at the last hearing concerning the right of a secured party to adequate protection in respect of diminution resulting from currency exchange rate fluctuations. Following my consideration of those supplemental submissions I concluded that there was no need for my ruling to deal with that question because I was able, more narrowly, to decide the question simply on the basis of DnB Nor's failure to have timely requested adequate protection in its original motion with respect to the setoff and based upon my conclusion that the November 5 status conference hearing was a hearing that resulted in the grant of adequate protection prospectively and not retrospectively.

For that reason I believe that the request for administrative expense claim treatment as a superpriority claim and for adequate protection in respect of currency exchange fluctuations made in June, after adequate protection was already granted in November, was insufficient to provide for a claim within the period from September 17, 2008 to November 5, 2008, nor was it sufficient in respect of any other date within the September to November time frame. That's effectively my ruling, but if you need more I will provide a memorandum decision consistent with what I've just said.

MR. KRASNOW: Thank you, Your Honor. Your Honor, last, but not least, item 13 on the agenda is the motion of

William Kuntz, III for review of the dismissal of his appeal.

THE COURT: Mr. Kuntz?

MR. KUNTZ: Thank you, Your Honor. I believe my express mail papers reached the Court late yesterday afternoon. I got an electronic message from the service company last Thursday indicating --

THE COURT: I have your reply papers --

MR. KUNTZ: Right. I just wasn't sure in terms of tracking it if they actually arrived.

THE COURT: I received them and read them with interest.

MR. KUNTZ: Saturday I went to look for the physical papers that should have come. They didn't come, but I'm waiving any problem in terms of that so that this long-standing matter can go ahead. And what I have to simply say is there's two questions in my mind. Will the debtor's counsel admit they had a deep involvement with Grand Union? I mean, Mr. Miller is not here, but, I mean, Mr. Krasnow, I believe, should now be aware that in the third Grand Union bankruptcy case Weil, Gotshal was the co-counsel in New Jersey before Judge Winfield. Which is -- the problem that I have is because there was an escrow account that apparently was applied to a loan that Lehman Commercial Paper had. Without Judge Winfield's order, or Judge Walsh's order back from the '95 case, and, I believe, that was done because there was an apprehension that if it had

come up before Judge Winfield that Judge Winfield would have ruled in my favor instead of this debtor's favor now.

Secondly, in terms of lifting the stay, it's not that I'm trying to reach the funds in this estate. But I have other matters. For instance, the New York State Comptroller's Office is holding funds of Grand Union Capital Corp., and they take the position that without a judgment I can't have those funds. And as I understand it, if I, for instance, proceeded in Westchester County without relief here, which is, in part, on appeal, if I was correct that Lehman is improperly holding these funds, if I received a judgment in state court that would, in essence, be a constructive lien upon funds that are at least being held by the debtor, whether they're funds of the debtor's estate or not. I haven't been able to determine. I've been asking for a long time just for the simple documents. Nothing has been volunteered by the debtor. C&S Wholesalers up in New Hampshire, I've called them and called them and written them and faxed them and that's, basically, in a nutshell, what I'm here for.

THE COURT: Okay. We'll --

MR. KUNTZ: Thank you, Your Honor.

THE COURT: But before you sit down I just want to understand something that's more technical. About eleven months ago, at a status conference/omnibus hearing, your motion was heard.

MR. KUNTZ: And denied.

THE COURT: And I remember it pretty vividly. It was mid-October. You were in the back of the courtroom. The case was called, and you said that you were going to just rely on the papers.

MR. KUNTZ: The courtroom was packed, Your Honor. It was the first omnibus hearing.

THE COURT: I remember it.

MR. KUNTZ: Thank you, Your Honor.

THE COURT: I remember it. And I remember seeing you. And I remember what you said. And I, having looked at your papers thoroughly, I concluded that you had not established cause for relief from the automatic stay under the very same legal standard that I have applied in every motion for stay relief that has been applied in this case and in every other case that is before me, which is the Sonnax case, which is a Second Circuit case that lays out a list of approximately twelve standards that Courts consider in deciding whether or not to grant relief from the automatic stay.

MR. KUNTZ: I understand that, Your Honor.

THE COURT: And --

MR. KUNTZ: The issue was, and I think I put this forward, was the order was with prejudice. I probably could have, without a prejudice denial I probably would have just let the matter sit.

THE COURT: So is the only -- just so I'm clear. The only issue that brings you back to Court on a Rule 60 motion is that you believe that the motion that you had filed should have been simply denied without prejudice as opposed to being denied with prejudice.

MR. KUNTZ: That's what I would have thought last fall. Things have developed a little bit more since then.

THE COURT: What's before me now? Is it the with prejudice/without prejudice language or are you seeking other relief?

MR. KUNTZ: I believe I'm seeking whatever is on the papers. I'm really not, I mean, this all came up in three days notice to me. So I put together a very -- I didn't even have a chance to even read in details the debtors' counsels' papers.

THE COURT: Look, here's my understanding of where we are procedurally. I ruled from the bench in October.

MR. KUNTZ: Yes, Your Honor.

THE COURT: You requested reconsideration under Rule 60, and you also appealed the denial of your motion for relief from the automatic stay to the district court.

MR. KUNTZ: That's correct, Your Honor.

THE COURT: There was a hearing that took place before Judge Rakoff in the Southern District of New York.

MR. KUNTZ: It was a conference.

THE COURT: I only read the transcript of that

hearing, and, apparently, because of the pendency in the Bankruptcy Court of your Rule 60 motion --

MR. KUNTZ: That -- Mr. Krasnow brought that up in court, yes.

THE COURT: Well, appropriately --

MR. KUNTZ: Yes.

THE COURT: -- because it's jurisdictional. Judge Rakoff determined that the district court did not have jurisdiction of the appeal because there was a pending and unresolved Rule 60 motion that was still in the Bankruptcy Court.

MR. KUNTZ: That's correct, Your Honor.

THE COURT: As a result this matter has been listed for today, as I understand it, solely for purposes of dealing with the Rule 60 motion that was filed shortly after my denial of your motion last year for stay relief. Correct?

MR. KUNTZ: Based, apparently, upon the affidavit that I filed subsequent to the conference in district court. But, yes, in essence, yes, Your Honor.

THE COURT: Okay. So I haven't heard you make an argument yet as to why you're entitled to relief from the order that was entered in October denying your motion for stay relief.

MR. KUNTZ: I haven't read the Sonnax opinion, Your Honor.

THE COURT: Excuse me?

MR. KUNTZ: I haven't read the Sonnax opinion, Your Honor.

THE COURT: Okay.

MR. KUNTZ: It, you know, I look at it in terms of a pragmatic situation. The people who know best what happened to this money, the 4 or 5 million dollars, are sitting right here. And they, up until I put in Judge Martin's (ph.) decision, which listed Weil, Gotshal as co-counsel in Grand Union, they basically are just, sort of, like, the three moneys sitting there. We don't know. This said, you know --

MR. KRASNOW: Objection, Your Honor.

MR. KUNTZ: And then, in the -- may I finish, Mr. Krasnow?

THE COURT: The -- at --

MR. KUNTZ: And then in the --

THE COURT: Mr. Kuntz.

MR. KUNTZ: -- WorldCom fee application --

THE COURT: Mr. Kuntz. Let me just break in. We're having, and I know you're pro se --

MR. KUNTZ: Pro se has nothing to do with this, Your Honor. This is a misrepresentation by this firm, to this Court, on matters of record in New Jersey and in this district.

THE COURT: But let me just stop you.

MR. KUNTZ: Thank you, Your Honor.

THE COURT: This is a very narrow legal question. And even though you're pro se I need to keep it narrow. We're not talking about Weil, Gotshal's role, if any, in another bankruptcy case.

MR. KUNTZ: It's --

THE COURT: Nor are we talking about Weil, Gotshal's role in this case. The only thing we're talking about is whether you have cause to prevail in connection with a motion under a particular, narrowly construed, federal rule that allows someone relief from an order or judgment after it has been entered.

MR. KUNTZ: I understand perfect, Your Honor. That's why we're here today.

THE COURT: Okay. That's what I want to limit the discussion to.

MR. KUNTZ: Well, when I am confronted with a rolling reference to a case in Oklahoma that has -- it is totally unrelated to the simple issues of if this debtor is holding or not holding millions of dollars taken from an escrow account. I'm not dealing with a Visa card account or not dealing with an eminent domain case in that. If those issues had been fairly addressed last year I wouldn't be standing here now. I simply would have, as Your Honor may note, filed my proof of claim and waited for the claims objection to come.

THE COURT: Have you filed a proof of claim?

MR. KUNTZ: Yes, I have. And I amended them this morning again.

THE COURT: Okay. If you have filed a proof of claim, and I don't get to the merits of that --

MR. KUNTZ: I understand, Your Honor.

THE COURT: -- at today's hearing, you have submitted the very same matter that is the subject of your earlier motion for stay relief to the claims administration process in the bankruptcy, have you not?

MR. KUNTZ: In part, Your Honor. My problem is, is that the -- that the -- there is no direct contractual relationship between Grand Union Capital Corp. and this debtor.

THE COURT: Then you may have no claim at all.

MR. KUNTZ: That may be, Your Honor, but the --

THE COURT: In which case we're spending a lot of time talking --

MR. KUNTZ: That may --

THE COURT: -- about something that --

MR. KUNTZ: That may be, Your Honor.

THE COURT: -- doesn't relate to Lehman.

MR. KUNTZ: But, you know, I'm hesitant to institute a proceeding in Westchester County State Court that might operate as a theoretical or practical lien upon these funds. And this is why I'm being overly careful. Most people would have paid no attention to it until they got the boom lowered on them. I

know better.

THE COURT: Well --

MR. KUNTZ: I've said enough, Your Honor. Thank you.

THE COURT: Whether you are proposing some kind of litigation in New York State Supreme Court in Westchester that may implicate the automatic stay in this bankruptcy case, I do not know. The only thing I can comment on is what's before me now, which is a motion under Rule 60(b) for relief from the order entered last October, 2008 denying your motion for stay relief, which was a bench ruling followed by an order that was entered of record. I'm going to let debtors' counsel speak to the issue, and then I'll rule on the 60(b) motion and we'll go to lunch.

MR. KRASNOW: Your Honor, Richard Krasnow, Weil, Gotshal & Manges. I stood to object to some of Mr. Kuntz's characterizations. I continue to object to them. Having said that, Your Honor, we rely on our pleadings and for the reasons set forth request that the Court deny the application. Thank you, Your Honor.

THE COURT: I've considered the papers filed, including Mr. Kuntz's reply, which I did receive yesterday, and I've considered the oral argument that has been presented by Mr. Kuntz on his own behalf. I understand his sensitivity to not wanting to violate the automatic stay. That sensitivity will continue as a result of this ruling. I am not revisiting

today the determination made last October to deny Mr. Kuntz's request for relief from the automatic stay.

The nature of Mr. Kuntz's claim as against the Lehman estate remains obscure to me, even as a result of the representations made concerning a possible constructive trust over assets that belong to the estate of another debtor, Grand Union Company. As I said previously, I know nothing about that case. I had no involvement in that case. I have not studied the docket or decisions from that case. I'm simply dealing with the case which is before me, which is the Lehman Brothers case.

It's apparent that Mr. Kuntz, based upon the papers filed, has not stated good cause for relief from the earlier order denying his motion for relief from the automatic stay. As a result that order stands, and from a procedural perspective this means that the 60(b) motion, having been resolved, is not longer pending in this court, which presumably means that to the extent there is an appealable right, and I'm not saying that there is one, that Mr. Kuntz can exercise to go back to the district court, the fact that there is a pending 60(b) motion no longer is an impediment to such procedure. Whether or not it is available, however, given the passage of time, is something that I don't comment on, nor am I asking anyone else to comment on.

MR. KRASNOW: Thank you, Your Honor. I believe we

have covered all of the matters for this morning.

THE COURT: Those who are coming back I will see at 2 o'clock.

MR. KRASNOW: Thank you, Your Honor.

THE COURT: We're adjourned till then.

(Proceedings recessed from 1:15 p.m. until 2:04 p.m.)

THE COURT: Be seated, please.

MR. SLACK: Good afternoon, Your Honor. Richard Slack from Weil Gotshal, for the debtors. In the first adversary proceeding on for this afternoon is the matter of Neuberger Berman v. PNC Bank and others. It is an interpleader action, Your Honor, and we're here on a pre-trial conference.

Briefly, Your Honor, what this case involves is a series of transactions that were back to back essentially where Neuberger Berman and a Lehman entity entered into a swap. It was -- there was another swap with another Lehman entity and then finally with PNC. There are -- there's a litigation, as Your Honor may know, in Pennsylvania that's ongoing, and Neuberger instituted this action which is an interpleader, essentially saying to this Court that it knows it has to pay the money and it's not sure to who.

There's a number of motions that have been filed and have been essentially put off because the parties are in fact in very serious negotiations over a settlement. It has taken a fair amount of time because there's a lot of moving pieces.

More recently, we've brought the committee into that process to work with us in trying to reach a settlement. I think, again, in all fairness, it's something that has moved slower than anybody thought, but the negotiations are in fact ongoing and, I think, have a great chance of being fruitful.

THE COURT: Good.

MR. SLACK: With that, Your Honor, I think that, from the debtors' point of view, even though we're here on a pre-trial, we think that the Court should recognize the efforts of all the parties in trying to reach agreement here and essentially put everything off until the next omnibus to give the parties a chance to reach agreement.

THE COURT: Does everybody concur in that assessment that time is helpful to the process?

MR. COHEN: Good afternoon, Your Honor. David Cohen with Milbank Tweed, here on behalf of the committee. We agree with that recommendation.

MR. YORSZ: Your Honor, Stan Yorsz for PNC Bank. We were the entity who started this with the case in the Western District of Pennsylvania. And I --

(Noise over loudspeaker.)

THE COURT: I don't think that was you.

MR. YORSZ: I agree that --

THE COURT: You agree it wasn't you.

MR. YORSZ: I agree it wasn't me. I would have

prefaced that by saying "Your Honor". I didn't mean any --

I agree that we have made considerable strides, and in fact there are draft stipulations circulating.

THE COURT: Good.

MR. YORSZ: We, PNC, wanted to get before Your Honor primarily because we believe LBCC has had some time now to determine what its position is. They had originally asked for an extension of time to answer or respond to July 22nd; that's been long gone. And we would just appreciate if we could get some indication from LBCC when they are going to provide some information to us on where they believe they stand, because I think the parties have been trying to effect a settlement, and we think it is an adversary proceeding that is imminently settlable.

The judge in the Western District of Pennsylvania has been cooperative in extending time for us to try to work it out up here because this is the lynchpin, but we would appreciate some guidance from either LBCC or the Court on, instead of simply saying let's put this over, if we could have some type of time within the next ten days, two weeks, when we could get some type of response from LBCC as to what its position is.

THE COURT: What kind of response are you looking for?

MR. YORSZ: We're -- well, we're looking for a response that LBCC has decided that it does not have an interest in what is essentially six million dollars that

Neuberger Berman has agreed that it would owe to PNC Bank if it were found liable. Ideally, that is a response, but at the very least, we'd like a response that they think they do have an interest in it and we can get started with this.

THE COURT: Isn't that part of the settlement process, or am I missing something?

MR. YORSZ: No, no, it is, but we have -- we've been at this for about --

THE COURT: And you're saying this is a missing ingredient --

MR. YORSZ: Yes.

THE COURT: -- that will help --

MR. YORSZ: We've been at this for a month and a --

THE COURT: -- that will help heal the settlement?

MR. YORSZ: Yes, yes. We've been at this for a month and a half, and at least from my client's point of view we don't seem to be making much progress, at least with regard to the LBCC position. So they would like, if possible, some indication of when we can get a response other than simply saying let's put it off, because unfortunately it may be if we put it off to the next month we're going to be here in the same position.

So, again, we would just like, if we could, get from LBCC some indication that okay, we've looked at everything, in ten days we'll tell you.

THE COURT: I think, as a result of being here today and making that presentation, you will not be in the same position next month. I don't know what position you'll be in, but it's not unreasonable to expect parties who are involved actively in settlement discussions to commit to a position between now and the time that a settlement is reached. What's the problem from LBCC's perspective? Is there a problem?

MR. SLACK: Your Honor, I'm a little surprised by that presentation. And we have been, I think, fairly clear with parties in a settlement context, which I think is the point of having settlement discussions, about what our positions are --

THE COURT: By the way, the settlement discussions are not going to be the subject of this conference, that's for sure. I don't want to hear anybody comment on something that's supposed to part of an ongoing and privileged and private discussion.

MR. SLACK: Your Honor, and that's exactly the point I'm making is that the only thing we haven't done is answer the interpleader complaint publicly. On a, what I'll call, private basis, we have had discussions. And I think that's reflected by the fact in the presentation that we just heard that there have been stipulations that have been -- gone back and forth. I mean, the parties are not far apart, I believe, in this. That doesn't mean you'll reach settlement, Your Honor. I understand that there still is some gap, and gaps sometimes

don't get filled, but I think it would not be beneficial for LBCC to be taking a public position in papers while settlement negotiations are ongoing.

THE COURT: I appreciate what you've said. I don't think I heard counsel request that anything be done publicly. I think it was a line in the sand for my benefit as much as for anybody else's to say that this process should not be allowed to go from month to month without meaningful progress. And I believe that I heard it suggested that if LBCC could express privately a position that it's prepared to live with with respect to whatever this missing piece is of the puzzle. And I know nothing about these discussions and will, as a result, make any number of stupid remarks between now and the end of this conference.

But my suggestion is that between now and the next status hearing we simply calendar it forward; there seems to be no objection to that. The parties acknowledge that ongoing discussions appear productive. There's a statement of concern that this may not be a month well spent unless certain positions are committed to privately by LBCC with respect to this dispute, I believe that's what I heard, and I would encourage that, although I'm not directing it, to the extent that's helpful to get this to a satisfactory conclusion. And I would hope that by calendaring this in October no one's going to want to be standing up and saying, well, we wasted a month.

So I suggest you use the month productively, and if you get to a settlement, do that. If you can't get to a settlement, I think you need to realistically assess the durability and difficulty of the dispute and whether or not it's something that can be effectively resolved by more time, by a mediator or by starting your engines and actually actively litigating the dispute here. It seems to me that next month is not a bad time for you to make that assessment. Does that make sense?

MR. SLACK: That certainly makes sense to us, Your Honor.

THE COURT: Incredible, because I don't know what I'm saying to you other than what I've heard you say, and I'm kind of repeating it back to you.

So if that makes sense, let's proceed on that basis.

MR. YORSZ: Thank you, Your Honor.

THE COURT: So that'll be on the October calendar, whenever we're hearing adversaries in October.

Next is State Street v. Lehman Commercial Paper.

MR. PHELAN: Good afternoon, Your Honor. Andrew Phelan on behalf of State Street Bank. This is a matter, Your Honor, that has not been in front of the Court in quite some time, not unlike the Neuberger case we have been put off from month to month on continuing the initial pre-trial conferences and status conferences.

I thought I would take just a couple of minutes to let you know where we are in the overall proceeding --

THE COURT: Okay.

MR. PHELAN: -- and to indicate where we are going in the next proceeding and likely schedule another initial pre-trial conference in October, as in Neuberger.

In this original complaint -- you may remember it, because we were surprised at how well you remembered it the last time we were in court -- State Street filed a --

THE COURT: I actually remember it vividly.

MR. PHELAN: -- State Street filed an adversary complaint regarding a repo transaction, a one billion dollar repo transaction, as a result of which State Street has purchased thirty-six loans.

We -- and the complaint was made up of two parts: one addressing those thirty-six loans and difficulties State Street alleged it was having with regard to getting cooperation and principal interest payments and such, and then the second part of that adversary complaint regarded a thirty-seventh loan involving 340 Madison, which State Street alleged was improperly taken out or converted from its repo account on the eve of the Lehman bankruptcy. And so State Street was proceeding with trying to recover that asset under a conversion-type theory.

In the months since November, the parties have been

cooperating and they have made substantial progress on the first half of the complaint as well as some significant progress on the second half. And on the first half, originally there were thirty-six loans; six of them were resolved -- or four were resolved in an exchange agreement that this Court signed, and then a total of twenty-five or twenty-six others have been the subject of A&As (ph.) that this Court has signed. So the parties have been able to make substantial part of the case.

The -- State Street has not come in and amended its complaint every time a new A&A has been filed. So the original complaint still stands as to that part of the case.

As the Court might expect, the easier ones, the Lola Hane (ph.) group, were the ones that were resolved through the A&As and through the proceedings so far, and the more difficult are the ones before that the parties are grappling with now. This is the second bucket. So the first bucket is the thirty-some-odd loans that have been resolved; for the most part there are no pending disputes with regard to that.

The second bucket is the ones that are -- have a little bit of hair on them that the parties are trying to resolve and are continuing their efforts to do so. There is no current indication that we are going to be involved in drawing the line in the sand and going forward with litigation on those, although we may need the Court's assistance if we can't

get some kind of discovery disclosure on some of them. But I will work on that with Mr. Comet and with the other real estate counsel that are involved for both sides.

The final bucket is the 340 Madison loan, which is one that has been carved out because it is not reasonably likely that the parties are going to settle their dispute with regard to that loan. We say it should have been in our repo pool; their position is that it should not have been. So never the twain shall meet on that issue unless we have some litigation and get some discovery on that point.

THE COURT: Where does that loan reside at this moment?

MR. PHELAN: It now resides with Lehman -- I believe it's Lehman Brothers Holdings, Inc., not LCPI, but that's as far as I know so far.

Now, Mr. Comet and I have been working together on electronic discovery issues, which have taken six or eight weeks. The parties have been going back and forth to try to identify what's needed to find search times and such that I won't trouble you with, but progress is being made there, albeit somewhat slow progress.

The parties then -- we also served a subpoena on Trimount (ph.), which is a third-party service server, and some delays -- there are some brief delays there, but I believe that productions will start within a week or so in that matter.

This brings us to where we are now with regard to the 340 Madison dispute. State Street in June or July amended its complaint as to the 340 Madison loan, and LCPI has answered that complaint just as to the 340 Madison loan part. So we're in a bit of a bifurcated situation where part of the adversary complaint is just remaining in a holding pattern as the parties work through and another part of it is proceeding.

We're at the point now that we need to develop and agree to a scheduling order or a trial schedule, discovery schedule, expert schedule in that matter. And I raised this, after we continued hearings month after month after month, a little bit late with Mr. Comet. So we have not finalized a schedule. We are in the neighborhood/in the ballpark, I believe, of having agreements on a schedule, which is why nothing yet has been submitted to the Court.

One issue that would be of assistance to State Street at least and, I believe, to LCPI is to understand where the Court is scheduling trials and what kind of a time frame we are looking for, because that's one of the issues that is keeping the parties apart a little bit. They want a period that's one -- or two to three months shorter than what State Street has proposed, and I don't want to build in too little time for the discovery that is needed in the event that we have more delays in getting the discovery that's needed to proceed with the action.

So the framework we're looking at now would have discovery closing in this matter next June, June of 2010, with expert discovery following -- for the following -- I believe it's two months, and motion or a pre-trial order coming in -- I believe it's September or October of 2010 under the schedule that Mr. Comet and I have discussed.

THE COURT: That's a pretty prolonged work plan. I'm not going to micromanage how much time is necessary to get to be trial-ready, and I appreciate your update. I don't understand at this moment what's going on with 340 Madison, nor do I understand why this is a dispute that can't be compromised globally. Part of what I need to understand from Mr. Comet, I think, is what it is about 340 Madison in particular that differentiates it from the other loans within the pool. I also need to know if there are any other similarly disruptive pieces of loan collateral that might be time-consuming.

And, and this is really my overarching question, it seems me that the parties up to this point have been quite effective in working out, through exchange agreements and otherwise, commercial solutions in reference to the pool of assets that are the subject of this repo transaction.

I'm not understanding why there is a need for ongoing litigation that includes a close of pre-trial activity a year from now in a dispute where parties have been so apparently effective in working with each other in resolving various

trades of assets to match, as I recall, certain assets that belong together that weren't there in the first place when the music stopped last year.

So my overarching question is, what makes this dispute so hard to resolve since you've been able to resolve so many little pieces of it up till now?

MR. PHELAN: I think -- and I'll answer the first part of it and have Mr. Comet provide what input he has on it. With regard to the 340 Madison, that's one loan that we know very little about except for the fact that it was taken out --

(Dialing noise over loudspeaker.)

THE COURT: Can you click that off?

MR. PHELAN: -- except that it was taken out of our repo pool on the eve of the Lehman Brothers bankruptcy. We also have, and we allege in our complaint -- not allege; we have recordings of communications about needing more assets for our repo loan and individuals on behalf of Lehman saying that they will be getting us more and better assets, because what was in there was not sufficient.

We don't know the details of what went on and how -- who was valuing the Lehman loans. There are some things that we don't know that we need to know, I believe, that would assist in opening up the discussions to see if there can be a resolution of that or not. But it's what we don't know that we don't know, so we can't make much progress until we get that.

I am anticipating that the parties should, within the next month, be producing -- or hopefully two weeks -- be starting to produce their electronic records, the e-mail traffic, which may very well be the most relevant evidence here as to what was happening and why the 340 Madison was taken out. That's -- that would be my answer: I just don't know enough on that issue.

THE COURT: Okay.

Mr. Comet, can you help me on this too?

MR. COMET: Yes. Howard Comet, Weil, Gotshal & Manges, for the debtors, Your Honor. To explain the situation regarding the 340 Madison loan, Your Honor, I need to just spend a moment explaining the overall structure of this arrangement. As Mr. Phelan said, this was a -- well, the repurchase agreement under which Lehman agreed to provide essentially a billion dollars' worth of loans with a certain margin above that to State Street, and this was a pool of loans.

If you parse through the agreements, I think it's quite clear and unambiguous that the agreements gave Lehman essentially complete right to decide what loans would be in this pool at any given point in time to take loans out, put loans in. And they did that regularly. And as long as they maintained the required valuation, that was all that they were required to do.

The 340 Madison loan was taken out of the pool on September 15th of last year, actually one year ago today, which was, as the Court of course knows, one day before the bankruptcy of the parent company, although the particular contracting party here, LCPI, did not file until, I believe, sometime in early October.

THE COURT: I think the dates are September 15th and October 3rd, I think, so that I'm not sure that you could have moved assets on September 15 because the bankruptcy was filed early in the morning on September 15, which was last year a Monday morning.

MR. COMET: Well, this -- well, this has -- the LCPI was not in bankruptcy, but -- and I may have the dates off by one, Your Honor, but it was --

THE COURT: Well, LCPI was not in bankruptcy --

MR. COMET: Right.

THE COURT: -- I believe, until October 3.

MR. COMET: Right. Exactly.

THE COURT: 5? October 5. I got a hand signal from a cooperative Weil Gotshal partner.

MR. COMET: The -- so I'm not -- there was no notice of default here from State Street until September 17th; I'm pretty confident of that date. And so I -- the bankruptcy is an issue -- and the notice of default was not based on the bankruptcy filing; it was based on other grounds.

So the issue of the bankruptcy here is simply, I think, that State Street has a supposition that because of the eminency of the bankruptcy filing this loan was taken out.

As far as we know, this had gone on, as I said, regularly, Your Honor. Loans were taken in and out of this pool based on the valuations that were placed on it. The Lehman records show that when this loan was taken out the required valuation continued to exist in the loan pool. And we know of no reason to think there was anything unusual about this.

I think there's no conceivable contract claim here that there was anything improper about taking a loan out because the contracts gave Lehman complete discretion. In fact, the operative language in the -- there's a series of agreements; each one supersedes the other in terms of any conflict. The operative language in the controlling agreement says "Seller", that's Lehman here, "shall have the unlimited right to substitute and/or withdraw purchased securities." And the agreement's also very clear that if Lehman withdraws a security, that terminates any interest that State Street has in a security, whether it's considered an ownership interest or a security interest, because the agreements all speak in terms of the possibility that it might be one or the other.

If -- what it says is "Upon" -- this is actually in the custodial agreement where the loan documents are kept:

"Upon transfer from the Buyer", that would be State Street's custodial account, "the Leased Assets shall cease to be purchased assets for all purposes hereunder, and without further action the security interest granted by the Seller to the Buyer with respect to such purchased assets shall be automatically released."

So State Street has, I believe, no contract claim. They have a separate claim that, to the extent the loans they've now received are ultimately received, or at whatever the appropriate date is, value less than a billion dollars, they have a deficiency -- a potential deficiency claim for which they could file a proof of claim. But what they're seeking to do in this action is say even though the contract may have said that you can take loans in and out, we somehow continue to own this 340 Madison loan notwithstanding this contract language.

And I think what the action is is in many ways a fishing expedition to find a basis to support that claim. We seriously considered filing a motion to dismiss but thought that, since in many cases a motion to dismiss is met with response, at least we should get some chance to find out the facts through discovery, that we would go forward at least initially with discovery. And I am becoming very concerned that the discovery process seems to be a lot more burdensome, onerous and extended than we had expected.

I -- we do have a dispute with State Street about the length of the process. I've suggested that we have a much significantly shorter discovery schedule and trial schedule than Mr. Phelan has suggested. I think we seem to be heading towards disputes on numbers of depositions and things of that sort as well.

And it may yet be the case, Your Honor, that we move for a judgment on the pleadings in order to get a determination whether there really is any legal issue here. I mean, the legal theories advanced are conversion, but I think that assumes the ownership interest that's in dis -- that we say under the contract clearly doesn't exist, constructive trust, but that is of course the usual last resort of somebody to try to create an ownership interest and depends upon proof of a fiduciary relationship, which I think is highly unlikely here.

So I think there's some serious issues about the case and the discovery, Your Honor, and whether it makes sense in that respect.

From the commercial perspective, Your Honor, the diff -- we've been able to resolve the other loans because they're really -- there's no dispute as to the other loans that remained in the pool, that Lehman had transferred something to State Street in connection with those loans. There could have been a dispute potentially as to whether it was ownership or a security interest, but it seemed not worth litigating that

because, even if they ended up as just holders of a security interest, it'd essentially be the same position.

THE COURT: Is 340 Madison the only problem loan that we're talking about?

MR. COMET: It's the only one of this sort, Your Honor. There are no others that -- there's -- where there's any question that they were in the pool. As Mr. Phelan said, there are a few that we're working on. There's one, for example, I know of that the documentation has all been prepared for State Street to simply take it over, and State Street has decided they may not want it and is waiting for that reason.

THE COURT: And what's the assumed value, unless that's a really loaded question, of the 340 Madison loan?

MR. COMET: The -- I don't have a today valuation, Your Honor.

THE COURT: Is this all worth fighting about? That's what I'm trying to figure out.

MR. COMET: Right. At the time that the loan was removed from the pool, it -- depending on how you look at it, it was valued at, I'd say, approximately twenty-five million dollars. There's one valuation that puts it at twenty-eight; there's another that puts it with a haircut involved in the margin at twenty-four something. So it's in -- I shouldn't have said twenty-eight; twenty-six, and then there's another, twenty-four. So it's in the neighborhood of twenty-five

million dollars.

THE COURT: It's in the mid-twenties, whatever it is.

MR. COMET: Yes. Which in the context of a billion dollar loan pool is relatively small. I think --

THE COURT: That's my point: Why are we fighting for a year over a rounding error?

MR. COMET: I agree, Your Honor. I think there may be opportunities for the parties to sit down and, in conjunction perhaps even with some of the other loans that remain to be fully dealt with, to see if this can be factored in some kind of resolution of it. The -- you know, the issue is that twenty-five million dollars, Your Honor, obviously is a significant amount of money even --

THE COURT: I'm not by any means suggesting that twenty-five million dollars is not a significant amount of money; it is. And this is an estate in which, while we throw around big numbers at each hearing, twenty-five million dollars is real money and it's clearly worth fighting over not only because of the notional amount but because of the principal that's involved. I don't know that State Street's repo transaction is the only repo transaction we need to be concerned with. We're drawing bright lines that matter for purposes of estate assets and the assets of counterparties.

My only reason for referencing the relative value of the 340 Madison loan is that I have observed during the life of

this litigation what I view as constructive and cooperative behavior exhibited by counsel for State Street and counsel for LCPI in connection with the transfer of underlying assets, matching assets up and working out agreements. All I'm suggesting is that if 340 Madison is but one of thirty-seven total loans, thirty-six being indisputably in the pool and this one being disputably either in or out, it seems to be a universe that can be tackled.

MR. COMET: I think you're right, Your Honor, at least certainly the effort should be made. I suspect, given the real estate market and so on and without having an actual valuation, that we're probably really talking less than twenty-five million in actual value today in any event; but as I said, we don't have a current appraisal.

THE COURT: Would mediation be helpful to the parties? I spent the entire morning dealing with alternative dispute resolution issues for in-the-money derivative transactions. The order applies only to those, but the concept applies across the board to all disputes in this case. The only thing that distinguishes this from the other potential disputes is that this is a real dispute. And there are real orders involved, and I could, if I wanted to, direct that you mediate. Would that be useful?

MR. COMET: It may be, Your Honor. One shortcoming I have in responding is that a lot of the discussions that have

gone on about this I have not been involved in. As Mr. Phelan, I think, suggested, the real estate lawyers have been talking -- on each side, have been talking to each other directly. And I would like, if I could, to consult with them and then talk with, I guess, Mr. Phelan maybe. And I think it may well be helpful. Could we -- I guess my question would be, could we advise the Court on that after checking with our clients and so forth?

THE COURT: My suggestion, based upon this dialogue, is that we put this over to the October adversary omnibus date and that between now and next month that the parties at least explore the following things: First, there has to be a way to deal with what seems to be a relatively narrow dispute in less than a year's worth of discovery. That seems to me to be a prolonged period not justified by my understanding of this dispute. So come up with a much shorter period if this thing has to be litigated, or come up with a justification for a longer period, because I haven't heard one.

Secondly, I believe that from what I've heard this is a dispute that's capable of resolution by the parties themselves or by the parties with the assistance of a mediator if the parties can't. Past behavior suggests an ability to reach agreements on at least portions of the pool. I see no reason why agreements can't be reached on the entirety of the pool. But whether or not it can or cannot be achieved, the

process of attempting to achieve such a settlement may help the parties narrow the issues or at least reach partial settlement.

So I would suggest that that at least be explored within the month, and I'd like a status report on your efforts next month. At the next status conference, we should set a pre-trial order if you're unable to reach an agreement either on a settlement or means to achieve a settlement. And I'm going to treat this much like the previous case involving Neuberger Berman as a matter that's going to go to next month with a progress report to be made, and then we can set dates in October.

MR. COMET: Very good, Your Honor.

THE COURT: Sound reasonable to both of you?

MR. PHELAN: That is acceptable, Your Honor. Thank you.

THE COURT: Okay, fine.

MR. COMET: Thank you.

THE COURT: Next is BNY Corporate Trustee Services.

(Pause)

THE COURT: This really does seem to be the perpetual litigation.

MR. SCHAFFER: Indeed.

THE COURT: That's my pun of the afternoon.

MR. SCHAFFER: Your Honor, Eric Schaffer, Reed Smith for BNY Corporate Trustee Services.

Your Honor, we're not hear to reargue the motion to dismiss, we lost. We're here for the limited purpose of dealing with the issues raised in the motion for a stay. We're seeking a stay only until the district court can determine whether or not to accept -- to deal with our motion for leave to appeal. If it denies that it's a very short stay we're talking about. If it accepts that appeal, leave is granted, we would ask for a stay to continue.

One thing that occurred to me earlier today, Your Honor, is that a stay does not have to interfere with briefing summary judgment. As you know, we're going to be here anyway in the AFLAC case dealing with similar issues so I think it would be inappropriate for me to say let's stay that also. But we do ask that the decision on summary judgment, if there were to be one, be stayed. My reason for proceeding with the motion today is that while theoretically we might have raised it closer to the summary judgment argument, I don't want to be in a situation where someone says you should have been here in September, you're too late.

Your Honor, one other preliminary matter. LBSF says that we didn't tell the Court we were going to appeal. Your Honor, we said we might appeal and I want to offer my sincere apologies to the Court if you were looking for something more. Certainly no desire on our part to offend the Court.

THE COURT: I'm not offended.

MR. SCHAFFER: Well, I'm pleased of that Your Honor and I don't think --

THE COURT: I'm disappointed but I'm not offended.

MR. SCHAFFER: Your Honor, I made a point of saying that we might appeal and again, if you were looking for something more that was my misunderstanding and --

THE COURT: Well, the only reason -- the only reason that I raised the issue, and this is something that's been coming up from time to time in the Lehman case, and frankly some of my other cases as well, I'm just going to make this observation it's unrelated to the specifics of your situation, but you're in the envelope that's affected by it. Partly because of the number of contested matters, adversary proceedings and other disputes that require adjudications from this Court, not only in the Lehman case but in a variety of other cases that are currently pending and that are assigned to me.

When a matter is to be appealed, I prefer, to the extent that parties are able to accommodate me, to be able to give the district court a coherent statement of my reasoning in any particular matter. So that in reviewing the bankruptcy court's decision the district court has more than what may be a less than coherent transcript or an inaccurate transcript. Because there are times when I know that certain words that I use end up in the transcript, not the words I used but

something that sounded like a word I used.

For that reason, I would like very much to have an opportunity to get it right, assuming I have the time to do that. At least get it right as far as I see it. Somebody else may ultimately say I got it wrong.

MR. SCHAFFER: Your Honor-

THE COURT: I'm not quite done. So for that reason I had requested that if there was to be an appeal, and candidly I'm surprised. You have your right to pursue whatever relief you think appropriate. I'm surprised, given the argument that took place in connection with this matter last month, that you chose to pursue an appeal because it is an instrument for delay. And we have been involved in a process which has been designed to expedite proceedings here and to coordinate, to the extent possible, those proceedings with those related proceedings that are going on in the High Court in London.

I received, yesterday, correspondence from the High Court in reference to a letter that I had written requesting cooperation. And I believe that all parties in the Perpetual litigation received, or were supposed to have received, copies.

MR. SCHAFFER: Not yet.

THE COURT: And it's a very lovely letter and very elegantly typed. And I appreciate the fact that the High Court is paying attention to what's going on in the bankruptcy court for the Southern District of New York.

But my understanding of the timing considerations and of the procedure is that we still have timing pressure in order to coordinate this case with the perpetual case in the UK, that part of that case is on appeal to the appellate court in England. That part of the case has been retained at the trial court level relating to indemnity issues. That's about as much as I know but I am under the distinct impression that the process you are undertaking on behalf of your client, and I'm not trying to discourage you in any way from doing what you think best for your client, could turn out to be a recipe for delay that will be most detrimental to LBSF if this ends up in what could turn out to be a prolonged process in the district court.

Now I don't mean to suggest that the district court is not timely in disposing of bankruptcy appeals because, on occasion, the district court judge assigned the case may be quite adept at processing an appeal. But my experience is that it will take some time, assuming you're granted leave to appeal at the district court. So I'm a little concerned about your motives.

MR. SCHAFFER: Your Honor, if I may speak to that. Your Honor, we are not interested in delay. Our goal today is the same as it was at the initial pre-trial, indeed the same as it was when LBSF came here asking for leave to file a summary judgment. We do not want to be in a situation where we're

dealing with conflicting orders of court.

In terms of the timing of the district court, we've been checking with the clerk in this court on a daily basis to find out when it will be transmitted. And our understanding is, our papers have not yet been transmitted. I don't understand why but they say they're waiting for a thirty-nine dollar fee to be paid by Lehman. And I'm hoping to understand more about that because I can pay that on the way out if it would expedite things.

But let me focus on coordination. All right. I haven't had the benefit of seeing the chancellor's response to your letter. I am hoping that the coordination proves to -- proves to do a lot to resolve my issues. But coordination, in and of itself, is not a silver bullet. Until the English court, if it's inclined to do so, agrees to accept and to defer to this court's decision on the issues of bankruptcy law, we remain at risk of having conflicting orders.

And indeed, I think the concern is all the more real because, well Lehman says the English court is waiting for this court's decision. Let's remember, the English court said it would consider requests, it did not say it would defer. When LBSF asked for a stay of the English proceedings so that it could proceed here in the first instance, that request for a stay was denied. Had the High Court agreed to defer to this court, we wouldn't have a conflict; we wouldn't be concerned at

all.

The English court did agree, as we understand it, to give the U.S. court time and space to consider issues under U.S. law. And of course the issues we raised under Rule 19 and comity are part of U.S. law. We have no reason to believe that the English court would disregard this Court's request for more time or that it would object to letting an appeal proceed if the district court were so inclined. And indeed the High Court in England has to wait for the decision of the court of appeals in England.

In some ways, Your Honor, it may be that Lehman benefits most from an appeal because the High Court granted Lehman leave to appeal on an expedited basis so that this Court would have the benefit of the decision on English law after which it could, and I quote, "determine what sort of requests it would wish this court," the English court, "to consider". So I don't think we've got a situation where coordination deals with all of the concerns.

Now, this Court is very much aware that there is another somewhat similar case involving AFLAC. And if LBSF is looking for a precedential decision, that might be the decision and that certainly could be communicated without putting us into this conflict. It's a conflict that LBSF said, in England at the beginning of that litigation; they said it would be wholly wrong for us to be subject, for BNY to be subject, to

conflicting orders. And yet here we have them seeking a decision that would be in direct conflict to what the High Court decided and that's not coordination.

So from our standpoint, requesting leave to appeal is wholly consistent with the goals of coordination with respect for both courts and with avoiding conflicting decisions.

Your Honor having said that, maybe it would be useful for me to just address the standards of review and the record you have before you on this particular motion.

Judge Gerber, in the General Motors case, noted that different cases state the factors applicable to such a motion differently but we think they're all variations on a theme. And while the suggestion has been made that we're relying on the wrong cases, I think that there is substantial overlap in the factors.

The first is, under Judge Gerber's decision, is there a substantial possibility, although less than a likelihood of success on the merits? And while LBSF says that we have not addressed the merits, we did file a substantial brief in support of our motion for leave. And while they talk a lot about the standards, we don't think they're really arguing with the cases, with the issues as we set them forth in that motion. They wrote a thirty-page brief, I don't believe they view our request for leave as being frivolous.

Now this Court saw the crux of the matter that was

raised by our motion as to whether BNY is a fair representative capable of litigating in Perpetual's absence. And you found that we were an adequate representative capable of litigating. But the question we pose on appeal, if it's permitted, is not whether we're capable of litigating but whether requiring us to do so would be contrary to Rule 19 or comity. Should we be compelled to undertake a representation that threatens to create a prejudice that otherwise wouldn't exist. That's really the question, should we be compelled to do that? And I think that Congress and the courts have looked at Rule 19 as a prime example of an issue where interlocutory review is appropriate, this sort of due process issue should be taken on at an early state.

Now, is there a substantial possibility of different opinions here? Well again, we've got extensive briefs on the motion for leave. I think that, in and of itself, suggests that there are substantial possibilities.

Now Your Honor, you will understand that we respectfully disagree with your determination that we serve as a fiduciary, although the Court recognized that we have been given a right to indemnification in England. We don't have that indemnification and until we have that, until we have a satisfactory indemnification in place, it is our position, looking at the language of the documents, which I won't rehash, that we have no obligation.

One other point I would make with regard to the citation of the FDIC case in LBSF's papers, we think that's entirely irrelevant because here we have not been acting on behalf of Perpetual. We have no duty and indeed we've been antagonistic to Perpetual.

A last point on the merits, we think there is a substantial possibility that a district court would see a conflict between this Court's decision and the decision of the court of appeals in Rappaport. So an immediate review might materially advance termination because if it turns out that on appeal we are correct in our reading of Rule 19 on our invocation of comity, this case goes away.

Now LBSF says, this case really is too complicated for interlocutory review. But this Court said, during oral argument on the motion to dismiss, "We're not dealing with discovery or witnesses or evidence. We're dealing purely with legal issues."

We may have novel issues of bankruptcy law here but those are reasons, if anything, to let threshold procedural issues, due process issues, go first. We think these can be addressed quickly and cleanly. But if the district court thinks it's too complicated, presumably it'll say so, and we won't be permitted to proceed with an appeal.

Irreparable injury. Well, if we are compelled to defend Perpetual's position without indemnification in place we

may be second guess and worse, again, we may face conflicting judgments, a very real risk.

Of course, if LBSF prevails on summary judgment or after trial, there could be appellate review of these same issues if the case would go up in its entirety. My concern then, though, is that a decision on the merits, if LBSF were to win, would actualize the conflict. Until such time as we might see a different decision from the appellate court, we would have the conflict. Again, that assumes that the chancellor is upheld on appeal in England.

I won't spend much time on the irreparable harm to Perpetual; I think the Court understands that. Let me, instead, talk about whether there is any prejudice to a stay from Lehman's perspective. The assets aren't going anywhere. The AFLAC case is not going to be stayed. There is a chance for LBSF to seek its precedential decision there.

Now, why do we need a stay if we're going to be here anyway briefing issues in the AFLAC case? Well, it's to prevent conflicting judgments in the perpetual case. AFLAC doesn't present that risk and, Your Honor, during the argument on the motion to dismiss you had a colloquy with Mr. Miller where you said -- you observed that AFLAC's different. There the holder is in court. We have direction and indemnification, we only have one court.

Again, there's no reason to think the English court

would not wait. And again, it can't act now because Lehman has filed an appeal of the chancellor's decision.

Your Honor, last of the factors here is the public interest. The Supreme Court has noted that there is a substantial public interest in Rule 19 issues. It's important to know that you have the right parties and to have effective disposition of threshold due process issues. We think that a stay promotes an orderly process and voids what might be this Court inappropriately reaching the merits.

If the district court grants the motion for leave, presumably it sees the real issue, in which case public interest favors having the benefit of the district court's thinking.

Your Honor, again, I'm not looking to reargue the motion to dismiss so let me just conclude by saying you recognize there might be an interlocutory appeal for the reasons we've set forth in our papers, in our argument. We believe it warrants a stay pending the district court's determination on our motion for leave.

THE COURT: All right. Thank you.

MR. MILLER: Good afternoon, Your Honor. Ralph Miller from Weil, Gotshal & Manges here on behalf of Lehman Brothers Special Financing, Inc., known as LBSF.

This motion for stay should be denied because movant BNY can't show any of the four elements that are required in

the Second Circuit for the extraordinary remedy of a stay while a motion for leave to file an interlocutory appeal is pending.

I can be brief because the Court has already highlighted some of the key points and because I think our opposition made some things clear. But I do want to clarify some confusion that may have been generated in the argument that we just heard.

First of all, if I might approach the Court with a couple of case copies?

THE COURT: Sure.

(Pause)

MR. MILLER: Your Honor, the three cases I passed out are the General Motors case that was just cited, recently decided by Judge Gerber. A case that was cited in our opposition papers from the appellate panel, and I'm not sure how to pronounce it but I call it Bijon Serrif (ph.) and then finally a case that was not cited in the briefs but seemed to be implicated by some of the argument we had just now, which is a Fourth Circuit decision in a case called the Rockel (ph.) case. And it deals with the right to appeal Rule 19 rulings.

If we -- the first thing that was interesting was that Mr. Schaffer changed the order of the factors listed by Judge Gerber in General Motors. He said the first factor listed, and these are listed on page 6 and highlighted, I believe Your Honor, in this copy. He said the first factor listed was the

substantial possibility of success. Actually, the first factor listed was the irreparable injury factor, which is also the first factor listed in the last page of the Bijon Serrif opinion. And these are essentially the same four factors that need to be used. These are different from the factors that were listed in the motion that was filed by BNY. And we pointed out in our opposition that these are the correct factors.

The irreparable harm factor by itself actually determines this question, I think, because the normal reason for an interlocutory appeal is that there's going to be some reason that the normal appellate process does not deal with the issue. And as Mr. Schaffer pointed out, the money is under the control of BNY. So we don't have a situation where some other party, outside of BNY's control, is going to do something with the race of the case, so to speak, with the factors.

The other critical point, Your Honor, and this is why I passed out Rockel case, is that courts recognize that Rule 19 is an interlocutory issue that can be brought up after final judgment. If you turn to page 3 of that opinion, it says that should the GW II defendants, suffer an adverse ruling on the merits we could review the Rule 19 issue in an appeal from that judgment.

So the idea that there's going to be a summary judgment that is going to become binding and they're not going

to have a right to raise Rule 19 in the normal fashion simply doesn't apply here. There is absolutely no possibility of an irreparable harm showing. What he said, and I wrote it down, was that this could actualize the conflict. I don't know what that means but the point is that a summary judgment ruling would actually focus the issues for coordination. I have to admit it's possible it would eliminate them if the Court ruled against LBSF. If the Court ruled for LBSF and clarified U.S. bankruptcy law, that would greatly aid coordination.

We believe -- so the first factor, which was listed and is listed first in most of the cases, really dooms this motion. And I might note, Your Honor, that the cases recognize that there has to be a showing on all four of these factors. There's some difference in the language about whether it's a balancing test or every factor has to be shown. But clearly the irreparable harm factor is critical.

With regard to the substantial possibility of success, that has to be shown twice here. It has to be shown first on leave to appeal and then it has to be shown on the merits of the appeal. I'm not going to spend any time on the merits, the Court; I think has already provided a very compelling explanation on the merits. On the issue of leave to appeal, the standard in this circuit is that there has to be a controlling issue of law on which there is a likelihood of disagreement.

And here, Your Honor, we don't believe that there is a controlling issue of law. There is a question of how the law should be applied to the facts in this record but the case law is pretty clear that an interlocutory appeal is not appropriate if the Court has to go into the record on appeal to try to find out if the district court or the bankruptcy court correctly applied the law to the record. And here this record includes not only this proceeding but understanding the AFLAC case and understanding the Perpetual case. And we don't believe that this is a case that meets any of the elements, frankly, for leave to grant an interlocutory appeal. So we think they have not made a showing on the element of a substantial possibility of the leave to appeal. And then even if they got the leave to appeal, there's no showing of a substantial possibility that the appeal will be meritorious.

The third element the Court has already touched on and that is the injury to other parties. And if the stay is granted, it is quite certain that one set or the other of parties besides BNY will be injured. As the Court points out, whether it was the intent of BNY or not if the stay is granted it would delay the resolution of these bankruptcy issues in this group of cases, at least in this case, in a way that could go back to the London court and that could be used to allow the coordination process.

That has the real possibility that the London court,

which as Mr. Schaffer points out has not promised to stay and has not promised to defer, it simply allowed some time, may determine, and we understand that court operates under some mandates of expedited processing that it must rule. And if it does rule then it's possible that LBSF will lose its right to have these bankruptcy issues decided before an order is entered which could direct BNY to comply. And at that point there is irreparable harm. Once this money is paid out, ever getting it back becomes very problematic and maybe impossible. So LBSF actually faces a risk of irreparable harm from the delay that this could produce.

If the English court should defer and there is a delay then Perpetual and Belmont, which have been urging that court to act promptly will suffer a delay. So either way the delay is going to injure somebody other than BNY. And BNY, as it keeps pointing out, it says more or less a stakeholder; it's in the middle here. So it's not actually being hurt as long as it's not asked to pay the money twice, which I don't think anybody has ever suggested as a realistic risk.

The final factor has to do with public interest and I think it merges, to some extent, with the interest of the other parties. But in this particular case coordination and comity is in the public interest. And the issues that are being presented in this case are of importance to litigants not only in this matter but in a number of other matters pending, not

pending but matters that are in dispute around the globe. And delay in having the U.S. bankruptcy issues resolved so that that resolution will be before the English court and it can take them into account could affect many, many other parties. So the public interest is not benefitted by the delay that is inherent in this kind of stay.

So for all these reasons, Your Honor, we believe that BNY has not shown any of the elements and it certainly has not made the necessary showing either under a balancing approach or under the requirement. It must show all of the elements and the motion for stay should be denied.

I'd be happy to answer any questions, Your Honor.

THE COURT: I don't have any questions. Mr. Schaffer, do you have anything more?

MR. SCHAFFER: Your Honor, I think I covered everything in my initial remarks.

THE COURT: Okay. Based upon, not only this argument but my familiarity with the issues, that were debated extensively on the record last month in connection with the Rule 19 issues and the BNY motion to dismiss I find no basis to stay proceedings, at least at this juncture.

I also think that it's difficult for me to even apply the factors outlined by Judge Gerber in the General Motors decision in this setting, in as much as the record on the motion for leave to appeal hasn't even left the building. The

option remains that a district court judge may, upon review of the papers submitted on the merits of that motion for leave to appeal, find merit in BNY's position. I don't want anything that I say now to indicate, one way or the other, how the district court should rule to the extent that the transcript of these remarks end up before that judge.

But based upon my familiarity with the underlying dispute here and in fact counsel's admitted involvement in the AFLAC case, which involves virtually identical issues that will be presented to this Court on BNY's behalf, it is difficult for me to fathom how the issues presented in the Perpetual case rise to the level of importance assigned to them by BNY's counsel.

This is really all about BNY's efforts to protect itself. No more, no less. And doing everything within reason to make sure that conflicting results in the U.K. and in the United States do not expose BNY to an impossible dilemma. I recognize that but that highly contingent and potential future risk does not constitute cause to stay these proceedings now. The motion is denied.

Is there more?

(Pause)

MR. MILLER: Your Honor, Ralph Miller again. I am advised that this completes the agenda for the debtors in the Lehman Chapter 11 proceedings. I don't know if there's

anything else on the agenda for other parties.

THE COURT: Well let me just supplement some remarks I just made. I want it to be clear that my ruling in connection with BNY Corporate Trust Services' request for a stay is predicated upon not only the remarks I made but upon the comments that Mr. Miller made referencing Judge Gerber's decision and the four factors that are the standard factors for granting or denying a stay pending appeal. And I'm satisfied that those standards are not satisfied.

I believe that there is a recognition hearing in the Lehman Re Chapter 15 case, which is scheduled to commence immediately at the conclusion of this afternoon's omnibus hearing. We'll take a ten minute break and start with Lehman Re. We're adjourned for ten minutes.

MR. SCHAFFER: Thank you, Your Honor.

MR. MILLER: Thank you, Your Honor.

(Proceedings concluded at 3:14 PM)

I N D E X

R U L I N G S

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Motion of Washington Mutual Bank f/k/a Washington Mutual Bank, FA for relief from the automatic stay [Docket No. 4759] approved	27	1
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C E R T I F I C A T I O N

I, Clara Rubin, certify that the foregoing transcript is a true and accurate record of the proceedings.

____

Clara Rubin

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